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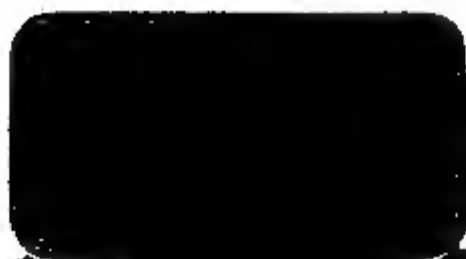
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LAW OF REAL PROPERTY

AS EXTENDED TO THE

RIGHTS, DUTIES, LIABILITIES, AND
REMEDIES

OF

LANDOWNERS.

VOL. III.

By CHARLES T. BOONE.

BANCROFT-WHITNEY CO.,
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1901.

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PREFACE.

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The present volume, intimately connected with the two preceding ones, may be regarded as supplementary thereto. The chapters and sections run consecutively, and references are made in the notes to preceding sections treating of the same subject matters in the first two volumes. The opening chapter treats generally of the rights and duties of landowners, and the following chapters treat in detail the various remedies to which landowners may resort to protect their rights and interests, or to obtain redress in case of their wrongful invasion. The rules of procedure will be found to vary to some extent in different states, as modified by statute, but the controlling general principles applicable to the various remedies are substantially the same, and the attempt has been made to state those principles clearly and fully.

CHARLES T. BOONE.

San Francisco, March, 1901.

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4 *Alexander v. Gibbon*, 118 N. C. 796, 54 Am. St. Rep. 757.

5 *Williams v. Buchanan*, 1 Ired. 535, 35 Am. Dec. 760; *Woodford v. Alexander*, 35 Fla. 333; *Booth v. Small*, 25 Iowa, 177; and see *Mayor v. Park Commissioners*, 44 Mich. 603.

6 *Mather v. Trinity Church*, 3 Serg. & R. 509, 8 Am. Dec. 663.

7 *Wilmoth v. Canfield*, 76 Pa. St. 150. See *Bellefontaine Imp. Co. v. Niedringhaus*, 181 Ill. 426, 72 Am. St. Rep. 269.

8 *Ragan v. Kansas etc. R. R. Co.*, 144 Mo. 623.

9 *Bacon v. Sheppard*, 11 N. J. L. 197, 20 Am. Dec. 583.

§ 412. Right of Owner to Defend Possession.

One who is owner and in possession of premises has a right to defend their possession, and such defense may justify an assault and battery.¹ So he has the right, if necessary, to destroy the means used to invade his possession.² But in defending his possession a landowner is not justified in the use of unnecessary force.³ An agent has a right to defend his principal's possession of premises, and this right is not affected by what he has said in the latter's absence about the latter's title, so long as he did not speak as agent, and has given no license to occupy the premises.⁴

1 *Harrington v. People*, 6 Barb. 607; *Filkins v. People*, 69 N. Y. 101, 106, 25 Am. Rep. 123; *Tribble v. Frame*, 7 J. J. Marsh. 599, 23 Am. Dec. 439; *Lyon v. Fairbank*, 79 Wis. 455, 24 Am. St. Rep. 732; *Blades v. Higgs*, 10 Com. B., N. S., 720.

2 *People v. Kane*, 131 N. Y. 111, 27 Am. St. Rep. 574; *Kendall v. Green*, 67 N. H. 557.

3 *Johnson v. Patterson*, 14 Conn. 1, 35 Am. Dec. 96; *Mills v. Munger*, 21 N. Y. Supp. 923; 66 Hun, 634.

4 *Clinton v. Root*, 58 Mich. 187, 55 Am. Rep. 671.

§ 413. Rights of Proprietors in Different Stories of Building.

Where separate portions of one dwelling become vested in different owners, a right of support, as incident to the property, passes by the conveyance to each grantee, unless excluded by the terms of the grant.¹ It was said in an early English case that if one man have the upper part of a house and the other the lower part, each may compel the other to repair his part in preservation of the others.² But it may be accepted as the settled American doctrine that the owner of one part of a building has no action against the owner of the other part for willfully permitting his part to get out of repair, whereby the plaintiff's part is injured.³ In an action on the case, by the owner of the lower part of a store against the owner of the upper part and roof, to recover damages for suffering the roof to be out of repair, it was held that the action could not be sustained, the court suggesting that the plaintiff could have relief only in a court of equity.⁴

1 *Richards v. Rose*, 9 Ex. 218.

2 *Tenant v. Goldwin*, 2 Ld. Raym. 1091; and so, to same effect, *Anonymous*, 11 Mod. 7.

3 *Pierce v. Dyer*, 109 Mass. 374, 12 Am. Rep. 716;

Ottumwa Lodge v. Lewis, 34 Iowa, 67, 11 Am. Rep. 135.

4 *Cheeseborough v. Green*, 10 Conn. 318, 26 Am. Dec. 396.

§ 414. Unlawful Severance from Realty—Ownership.

When that which is a part of the realty is unlawfully severed therefrom, it belongs to him who has the first vested estate of inheritance at the date of severance.¹ Oil in the earth belongs to the owner of the land,² and when unlawfully taken therefrom by a wrongdoer the title of such owner remains perfect, and he may pursue and reclaim it wherever he may find it.³

1 *University v. Tucker*, 31 W. Va. 621; *Williamson v. Jones*, 43 W. Va. 562, 64 Am. St. Rep. 891.

2 See sec. 6a, ante.

3 *Hughes v. United Pipe Line*, 119 N. Y. 423; *Williamson v. Jones*, 43 W. Va. 562, 64 Am. St. Rep. 891.

§ 415. Owner's Right to Use of Premises, Generally.

The general rule is, that the owners of property may use it in any manner they may see fit, so long as they do not injuriously affect the rights of others.¹ A landowner has the right to erect such buildings or other structures upon his land as he may see proper, and may put the premises to any use which suits his pleasure, provided, in so doing, he does not imperil others.² And it is held that the motive, be it what it

may in such a case, can have no effect, and does not prevent the assertion of the right of the real owner.³ In other words, if a man has a legal right, the courts will not inquire into the motive by which he is actuated in its enforcement.⁴ Thus, a landowner may erect upon his land the smallest or most temporary kind of dwelling-house or store in close proximity to the finest mansion or block of buildings, and that for the mere sake of spiting the owner of such mansion or block of buildings by the contrast, without becoming subject to restraint at the hands of the courts.⁵ So if one erects a building or high fence on his own land, the fact that it shuts out light and air from the adjoining owner gives the latter no remedy;⁶ and this is held to be so, although the building or fence was erected from motives of unmixed malice toward the adjoining owner.⁷ It has also been held incompetent for the legislature to vest in an adjoining proprietor the power to prevent his neighbor from building such structure as he pleases, provided it is not a nuisance, and that it is not a nuisance merely because it obstructs the passage of light and air.⁸ Other courts have, however, held that a fence erected maliciously, and with no other purpose than to shut out the light and air from a neighbor's windows, is a nuisance.⁹ As a general rule, one who owns land subject to an ease-

ment has a right to use his land in any way not inconsistent with the easement, and the extent of the easement is to be determined by a true construction of the grant creating it, aided by such circumstances surrounding the estate and parties as have a legitimate tendency to show the intention of the parties.¹⁰ A landowner cannot be prohibited by a legislative body from conducting a lawful business on his premises, unless such business is a menace to the surrounding property owners.¹¹ And the right to use his property in the prosecution of a lawful and necessary business cannot be made to rest upon the caprice of the majority or of any number of those owning property surrounding that which he desires to use.¹²

1 *Schwartz v. Gilmore*, 45 Ill. 454, 92 Am. Dec. 227; *Haldeman v. Bruckhart*, 45 Pa. St. 514, 84 Am. Dec. 511; *Beekly v. Skroh*, 19 Mo. App. 75; *Durham v. Muselman*, 2 Blackf. 96, 18 Am. Dec. 133; *O'Leary v. Elevator Co.*, 7 N. Dak. 554.

2 *Crawford v. Topeka*, 51 Kan. 756, 37 Am. St. Rep. 323; *Paine v. Chandler*, 134 N. Y. 385; *Peck v. Bowman*, 22 Ohio L. J. 111; *Detroit Base-Ball Club v. Depert*, 61 Mich. 63, 1 Am. St. Rep. 566.

3 *Mahan v. Brown*, 13 Wend. 261, 28 Am. Dec. 461; *Pickard v. Collins*, 23 Barb. 444.

4 *Phelps v. Nowlen*, 72 N. Y. 39, 28 Am. Rep. 93; *Jenkins v. Fowler*, 24 Pa. St. 308.

5 *Falloon v. Schilling*, 29 Kan. 292, 44 Am. Rep. 642.

6 *Knabe v. Levelle*, 23 N. Y. Supp. 818.

7 *Letts v. Kessler*, 54 Ohio St. 73. See, also, in support of this doctrine, *Frazier v. Brown*, 12 Ohio St. 294; *Chatfield v. Wilson*, 28 Vt. 49; *Lyle's Appeal*, 106 Pa.

St. 626, 51 Am. Rep. 542; Chase v. Silverstone, 62 Me. 175, 16 Am. Rep. 419; Ocean Grove etc. Assn. v. Commissioners, 40 N. J. Eq. 447.

8 Western etc. Marble Co. v. Knickerbocker, 103 Cal. 111.

9 Burke v. Smith, 69 Mich. 380; Flaherty v. Moran, 81 Mich. 52, 21 Am. St. Rep. 510; Kirkwood v. Finegan, 95 Mich. 543; and so, to same effect, see Chesley v. King, 74 Me. 164, 43 Am. Rep. 569; Rideout v. Knox, 148 Mass. 368, 12 Am. St. Rep. 560. In some of the states, as in Connecticut, the matter is controlled by statute: See Harbison v. White, 46 Conn. 106.

10 Onthank v. Railroad Co., 71 N. Y. 194, 27 Am. Rep. 35; Paine v. Chandler, 134 N. Y. 385.

11 Ex parte Whitwell, 98 Cal. 73, 35 Am. St. Rep. 152; Armstrong v. Medbury, 67 Mich. 250, 11 Am. St. Rep. 585. See People's Gas Co. v. Tyner, 131 Ind. 277, 31 Am. St. Rep. 433.

12 Ex parte Sing Lee, 96 Cal. 354, 31 Am. St. Rep. 218; State v. Tenant, 110 N. C. 609, 28 Am. St. Rep. 715; Matter of Jacobs, 98 N. Y. 98, 50 Am. Rep. 636.

§ 416. Right to Products of Land.

The ownership of land carries with it, at law and in equity, the right to its products, and no change can take place in the title to the fruits of the soil, unless the owner parts with his title or possession, or permits its cultivation for the benefit of another.¹ The labor of others for the owner of the soil creates no title to the products, though mingling in the production.² One having the mere possession of land has a right to the grass growing thereon as against a stranger, although the latter severs the grass from the soil.³

1 *Rush v. Vought*, 55 Pa. St. 437, 93 Am. Dec. 769.

2 *Rush v. Vought*, 55 Pa. St. 437, 93 Am. Dec. 769.

3 *Morse v. Iman*, 42 Ill. 150, 89 Am. Dec. 417. See sec. 5, ante.

§ 417. Rights as to Percolating Waters and Oils.

There are no correlative rights between owners of adjoining land in respect of percolating water, which is regarded as a part of the earth itself, as much as the soil and the stones, with the same absolute right of use and appropriation by the owner of the land in which it is.¹ A prescriptive right to percolating waters cannot be acquired, and a proprietor of adjoining lands cannot complain of a diversion of such waters.² A landowner may so use his own premises as to secure and appropriate petroleum oil which comes into his land by percolation, or by flowing through unknown natural underground channels.³

1 *Chatfield v. Wilson*, 28 Vt. 49; *Chasemore v. Richards*, 7 H. L. Cas. 349; and see sec. 141 et seq., ante.

2 *Wheelock v. Jacobs*, 70 Vt. 162, 67 Am. St. Rep. 659, and note, as to what are percolating waters, pages 663-672.

3 *Kelley v. Ohio Oil Co.*, 57 Ohio St. 317, 63 Am. St. Rep. 721; and see sec. 6a, ante.

§ 418. Right to Take Fish.

In this country, fish are *ferae naturae*, the common property of the public, or of the state. From this common property, the owner of the soil over which a nonboatable stream flows has

the sole and exclusive right to appropriate such as he may capture and retain.¹ But this right is subject to regulation and control by the representatives of the people, so that there shall continue to be a common property. And a state may, by statute, authorize its officers to go upon a stream, nonboatable and running through the lands of a private proprietor, and stock it with fish, whether such proprietor consents or not.² It has recently been held by the supreme court of Wisconsin that although the title to the bed of a navigable stream is in the riparian owners, yet the right to fish in such a stream is a right common to the public, and one who keeps within the limits of the stream may exercise such right without being guilty of trespass.³

1 See secs. 132, 132a, ante; *People v. Bridges*, 142 Ill. 30; *People v. Lumber Co.*, 116 Cal. 397, 58 Am. St. Rep. 183, and note.

2 *State v. Theriault*, 70 Vt. 617, 67 Am. St. Rep. 695; *Moulton v. Libbey*, 37 Me. 472, 59 Am. Dec. 57; and see, to same effect, *Magner v. People*, 97 Ill. 320; *Maney v. State*, 6 Lea, 218; *New England Trout etc. Club v. Mather*, 68 Vt. 338; *Ex parte Maier*, 103 Cal. 476, 42 Am. St. Rep. 129; *Lawton v. Steele*, 152 U. S. 133; *Rea v. Hampton*, 101 N. C. 51, 9 Am. St. Rep. 21; *Commonwealth v. Richardson*, 142 Mass. 71.

3 *Willow River Club v. Wade*, 100 Wis. 86, Pinney, J., dissenting in a lengthy opinion.

§ 419. Right to Erect Wharves.

A riparian owner on navigable water may construct in front of his land, in shoal water, proper

wharves and landing places, subject to the limitation that the public easement or servitude is not impaired.¹ And he has the same dominion and power to control such landing places as any other private property, and to possess and use the same to the exclusion of the public.² Nor can his right be taken away or its value lessened, even for public use, without compensation, or without due process of law, and it cannot be taken at all for private use.³ The destruction or material abridgment of the right is generally an injury, entitling the owner to redress.⁴ Such right is, however, a private right and is subordinate to the public right of navigation, and may be regulated or prohibited by law.⁵ It is held by the courts in some of the states that the owner of land on sea or bay shore has no right at common law to build a wharf or pier out from his land.⁶

1 Gregory v. Forbes, 96 N. C. 77; Land Co. v. Emerson, 38 Minn. 406. 8 Am. St. Rep. 679; Delaplaine v. Railway Co., 42 Wis. 214, 24 Am. Rep. 386; and see Water Power Co. v. Canal Co., 142 U. S. 271.

2 Compton v. Hankins, 90 Ala. 411, 24 Am. St. Rep. 823.

3 Janesville v. Carpenter, 77 Wis. 288, 20 Am. St. Rep. 123; Union Depot etc. Co. v. Brunswick, 31 Minn. 297, 47 Am. Rep. 789; Priewe v. Improvement Co., 93 Wis. 534; Buffalo v. Delaware etc. Ry. Co., 39 N. Y. Supp. 4.

4 Try v. Coal Co., 37 W. Va. 604; Kimberly v. Hewitt, 79 Wis. 334; Boorman v. Sunnuchs, 42 Wis. 233.

5 Cohn v. Boom Co., 47 Wis. 322; Madison v. Mayers, 97 Wis. 399, 65 Am. St. Rep. 127; Norfolk City v. Cooke,

27 Gratt. 430; *Duryea v. New York*, 26 Hun, 120; *Folsom v. Freeborn*, 13 R. I. 200; *Bond v. Wool*, 107 N. C. 139; *Dana v. Jackson St. Wharf Co.*, 31 Cal. 118, 89 Am. Dec. 164.

6 *Dana v. Jackson St. Wharf Co.*, 31 Cal. 118, 89 Am. Dec. 164; and so, to same effect, *Harbor Line Commrs. v. State*, 2 Wash. 530; *Eisenbach v. Hatfield*, 2 Wash. 236; *Bowlby v. Shively*, 22 Or. 410.

§ 420. Rights of Abutting Owners on Street or Highway.

The owner of land over which a highway is laid at all times retains his right in the soil for all purposes consistent with the full enjoyment of the easement acquired by the public, subject, however, to municipal and police regulations.¹ The easement of the public is the right to use and improve the street or highway for the purposes of a highway only.² And the right of an abutting owner to use a portion of the highway in a reasonable manner for special purposes is not subservient to the right of the traveling public, and its exercise without negligence imposes no liability.³ And he has the right to excavate under a sidewalk if he thereby does not violate any ordinance or regulation of the city, nor interfere with any existing public use of the street.⁴ So he has the right to defend against and enjoin a use of or an encroachment upon the street, under legislative or municipal authority, for purposes inconsistent with those uses to which streets should be or have ordinarily been

subjected, unless provision is made for just compensation.⁵ But it is held that, subsequent to a dedication or conveyance of land by the owner for a public street or highway, the dedicator or grantor has no greater right or interest in the use of such street or highway, as such, than any other person.⁶ Thus, a hotel proprietor, who owns the fee in the street subject to the easement of the public, has no more right to permanently occupy the street adjacent to the sidewalk in front of the hotel with his hacks, in violation of a city ordinance, than has any other person, nor are his guests entitled to any greater consideration in the use of the sidewalks and streets of the city because they are guests.⁷ An owner of lands abutting on a public highway has such a proprietary right to the center thereof that the refusal of one unlawfully upon such part of the highway to depart upon notice renders him liable as for criminal trespass.⁸

1 *Denniston v. Clark*, 125 Mass. 216; *Allen v. Boston*, 159 Mass. 324, 38 Am. St. Rep. 423; *Theobald v. Louisville etc. Ry. Co.*, 66 Miss. 279, 14 Am. St. Rep. 564; *People v. Foss*, 80 Mich. 559, 20 Am. St. Rep. 532.

2 *White v. Northwestern etc. R. R. Co.*, 113 N. C. 610, 37 Am. St. Rep. 639; *People v. Foss*, 80 Mich. 559, 20 Am. St. Rep. 532; *Huffman v. State*, 21 Ind. App. 449, 69 Am. St. Rep. 368.

3 *North Manheim Township v. Arnold*, 119 Pa. St. 380, 4 Am. St. Rep. 650.

4 *Allen v. Boston*, 159 Mass. 324 38 Am. St. Rep. 423; and see *McCarthy v. Syracuse*, 46 N. Y. 194; *Mairs v. Real Estate Assn.*, 89 N. Y. 498.

5 *Buffalo v. Pratt*, 131 N. Y. 293, 27 Am. St. Rep. 592, and note.

6 *Perry v. New Orleans etc. R. R. Co.*, 55 Ala. 413, 28 Am. Rep. 740; *City Council v. Parker*, 114 Ala. 118, 62 Am. St. Rep. 95.

7 *City Council v. Parker*, 114 Ala. 118, 62 Am. St. Rep. 95.

8 *Huffman v. State*, 21 Ind. App. 449, 69 Am. St. Rep. 368; and see *People v. Foss*, 80 Mich. 559, 20 Am. St. Rep. 532.

§ 421. Riparian Rights, etc.

This subject has been noticed at some length in preceding sections.¹ It may be observed in this connection that the rights of a riparian proprietor do not depend upon the quantity of water flowing in the stream, and he is entitled to an injunction restraining the unlawful diversion of the water, although the injury caused by the diversion is incapable of ascertainment, or of being computed in damages.² The upper owner of land on a stream may, as a rule, use the stream in a reasonable manner, for reasonable purposes, even for the purpose of carrying off waste matter, and whether the use to which he puts it is reasonable or not must be determined by the circumstances of the case.³ Where a stream flows through two adjoining tracts of land, belonging to different owners, and in the bed of the stream on the upper tract there is a natural ledge of rock, which retards the flow of the water so as to prevent the lower tract from overflow, the owner of the upper tract has

no right to remove such ledge of rock, and thereby so vary the natural flow of the stream as to occasion damage to the lower tract by causing water and sand to overspread portions thereof, which, but for the alteration, would not be so affected.⁴ A patent issued by the United States, purporting to be subject to any vested and accrued water rights which may be recognized and acknowledged by the local laws, customs, and decisions of the court, passes title subject to the rights of any prior appropriators.⁵

1 See sec. 4 et seq., and sec. 141, ante.

2 *Heilbron v. Fowler Switch Canal Co.*, 75 Cal. 426, 7 Am. St. Rep. 183; *Ferrea v. Knipe*, 28 Cal. 341, 87 Am. Dec. 128; *Lux v. Haggin*, 69 Cal. 258. And see *Churchill v. Lauer*, 81 Cal. 235; *Gehlen v. Knorr*, 101 Iowa, 700, 705, 63 Am. St. Rep. 418; *Smith v. Rochester*, 92 N. Y. 463, 44 Am. Rep. 393, as to the right of a riparian owner to the remedy by injunction for diversion of water.

3 *Ferguson v. Firmenich Mfg. Co.*, 77 Iowa, 576, 14 Am. St. Rep. 319; *Gehlen v. Knorr*, 101 Iowa, 700, 63 Am. St. Rep. 418.

4 *Grant v. Kuglar*, 81 Ga. 637, 12 Am. St. Rep. 348.

5 *Nevada Ditch Co. v. Bennett*, 30 Or. 59, 60 Am. St. Rep. 777, and note pages 799 to 817, as to what constitutes an appropriation of water. See, also, secs. 4, 146, ante.

§ 422. Right to Lateral and Surface Support.

At common law the owner of land has the right to lateral support of the soil from adjoining land.¹ But he cannot claim the support of adjoining land for any artificial structure he may erect upon his own land, and which increases the

lateral pressure.² The right to support for artificial burdens on land is an easement, and can be acquired only by grant, express or implied.³ But the doctrine that the right to lateral support between adjoining owners does not include the right to the support of an artificial structure has no application to the case of a highway.⁴ And inasmuch as an abutting owner is entitled to access to a highway, and to the lateral support thereof for his buildings, he will be entitled to an injunction restraining any unlawful interference with the highway, without showing negligence on the part of the defendant.⁵ Of natural right the surface land is entitled to support from the strata below, and when the owner of the whole fee grants the minerals, reserving the surface, his grantee is entitled only to so much of the minerals as he can get without injury to the surface, and a custom contrary to such right would not be reasonable, and, therefore, would be invalid.⁶ And where the owner of land conveys it in fee simple, reserving the coal, and afterward conveys the coal to another, the latter is liable to the grantee for subsidence of the soil by the mining of the coal, although the mining was carefully done.⁷

1 Sec. 144, ante; *Trowbridge v. True*, 52 Conn. 190; *Walters v. Hamilton*, 75 Mo. App. 237.

2 *Larson v. Metropolitan etc. Ry. Co.*, 110 Mo. 234, 33 Am. St. Rep. 439; *Obert v. Dunn*, 140 Mo. 476; *Dorrity v. Rapp*, 72 N. Y. 307; sec. 144, ante.

3 *Tunstall v. Christian*, 80 Va. 1, 56 Am. Rep. 581; *Gilmore v. Driscoll*, 122 Mass. 199, 23 Am. Rep. 312.

4 *Milburn v. Fowler*, 27 Hun, 568.

5 *Finegan v. Eckerson*, 52 N. Y. Supp. 993; 32 N. Y. App. Div. 233; 57 N. Y. Supp. 605; 26 Misc. Rep. 574.

6 *Horner v. Watson*, 79 Pa. St. 242, 21 Am. Rep. 25; *Coleman v. Chadwick*, 80 Pa. St. 81, 21 Am. Rep. 93. See sec. 146, ante.

7 *Carlin v. Chappel*, 101 Pa. St. 348, 47 Am. Rep. 722.

§ 423. Right of Support by Party-wall.¹

The right of support by a party-wall situated in part upon each of two adjoining parcels of land owned by different persons is an easement, a grant of which may be implied from its enjoyment for the period of prescription. And neither owner of an easement in a party-wall can lawfully remove it or interfere therewith, without the consent of the other owner, so as to injure the other's building, and if he does so, for the purpose of making improvements within the limits of his own lot, he is liable for the injury.² And no degree of care or diligence in the performance of the work will relieve him from liability for the injury caused by making such improvements. He must make them at his peril.³ It has been held that if a party-wall exists between two buildings with an easement in favor of one of the buildings to use a stairway and doorway through a party-wall, and the buildings and wall are destroyed by fire, and the parties

thereupon reconstruct the buildings and wall, the easement to maintain the stairway and to have and use the door is thereby revived.⁴ Where one of the parties to a deed to a party-wall covenants that he or his grantee will pay one-half of the cost of construction whenever he makes use of such wall, such covenant is personal to the party constructing the wall, and his assignee may maintain suit to enforce the payment of such liability.⁵

1 See sec. 145, ante.

2 *Briggs v. Klosse*, 5 Ind. App. 129, 51 Am. St. Rep. 238.

3 *Briggs v. Klosse*, 5 Ind. App. 129, 51 Am. St. Rep. 238; *Webster v. Stevens*, 5 Duer, 553; *Eno v. Del Vecchio*, 6 Duer, 17; *Dowling v. Hennings*, 20 Md. 179, 83 Am. Dec. 545. See *Bloch v. Isham*, 28 Ind. 37, 92 Am. Dec. 287, and note thereto.

4 *Douglas v. Coonley*, 156 N. Y. 521, 66 Am. St. Rep. 580. But compare *Hoffman v. Kuhn*, 57 Miss. 746, 34 Am. Rep. 491.

5 *Parsons v. Baltimore Loan Assn.*, 44 W. Va. 335, 67 Am. St. Rep. 769. See sec. 145a, ante.

§ 424. Right to Improvements Placed on Land.

The general rule is, that improvements of a permanent character made upon land and attached thereto, without the consent of the owner of the fee by one having no title or interest become a part of the realty and vest in the owner of the fee.¹ But where the owner of land stands by and permits another to expend his money in improving it, he may, in equity, be compelled to surrender his title on receiving compensation, or

else to pay for the improvements, provided he has, by his conduct, encouraged the other to make the improvements, or has so conducted himself, while they were being placed upon the land, as to make it a fraud in him to take them without paying their value.² In equity, when one has made improvements innocently, or through mistake upon the land of another, he will not ordinarily be allowed to enforce a claim for reimbursement as an actor, but when the true owner seeks relief in equity he may be required to make compensation for the improvements.³ The party seeking compensation must, however, show that he made the improvements under a claim of title which proved defective, or under some mistake concerning his rights, or because he was induced to incur the expenditure through the fraud or deception of the owner.⁴ And compensation will only be allowed for the increased value caused by the improvements.⁵ Under the statute of West Virginia, one who places permanent improvements on the land of another, at a time when he believed his own title to be good, is entitled to compensation for such improvements.⁶ It is held by the courts in some of the states that the general rule that things affixed to the freehold by trespassers or persons entering tortiously belong to the owner of the soil does not apply as against a body having the right of eminent domain, and who has wrongfully entered

and made improvements for the public purposes for which it was created, and given the right.⁷ Where one erects a house upon the land of another by mistake, supposing the land to be his own, which mistake was the result of his own negligence, and the fault of no one else, the house becomes a part of the land, and the one who erected it is not entitled either to remove the house, or enforce a lien against the land for the value of the improvement.⁸ But where structures are erected upon land by one having no estate therein, and hence no interest in enhancing its value, but done by permission or license of the owner, an agreement that the structures shall remain the property of the person making them will be implied, in the absence of any other facts or circumstances tending to show a different intention.⁹ It was formerly the rule that all fixtures annexed subsequently to the execution of a mortgage, whether by the mortgagor or by his tenant or licensee under a lease or license subsequent to the mortgage, became as to the mortgagee a part of the realty, and such is still the rule in those states which adhere to the doctrine that a mortgage is a conveyance.¹⁰ But the general tendency is to repudiate the old rule as inapplicable, in those states where a mortgage is a mere security, conveying neither title nor right to possession.¹¹

1 Jones v. Shufflin, 45 W. Va. 729, 72 Am. St. Rep. 848; Mathes v. Dobschuetz, 72 Ill. 438; Fischer v. Johnson, 106 Iowa, 181; Bonney v. Foss, 62 Me. 248. And see sec. 7, ante.

2 Crest v. Jack, 3 Watts, 238, 27 Am. Dec. 353, and note.

3 Ebelmesser v. Ebelmesser, 99 Ill. 541; Broumel v. White, 87 Md. 521; 3 Pomeroy's Equity Jurisprudence, sec. 1241.

4 3 Pomeroy's Equity Jurisprudence, sec. 1241; Williams v. Vanderbilt, 145 Ill. 238, 36 Am. St. Rep. 486. See Metcalf v. Hart, 3 Wyo. 513, 31 Am. St. Rep. 122; Barrett v. Stradl, 73 Wis. 385, 9 Am. St. Rep. 795.

5 Id.; Williams v. Vanderbilt, 145 Ill. 238, 36 Am. St. Rep. 486; Bacon v. Thornton, 16 Utah, 138; Coulan v. Sullivan, 110 Cal. 624.

6 Williamson v. Jones, 43 W. Va. 562, 64 Am. St. Rep. 891.

7 Illinois Cent. R. R. Co. v. Le Blanc, 74 Miss. 650; Railway Co. v. Dickson, 63 Miss. 380, 56 Am. Rep. 809; Daniels v. Railway Co., 35 Iowa, 129, 14 Am. Rep. 400; Toledo etc. Ry. Co. v. Dunlap, 47 Mich. 456; Justice v. Railway Co., 87 Pa. St. 28; and so, to same effect, Jones v. Railway Co., 70 Ala. 227; Railway Co. v. Adams, 28 Fla. 631.

8 Mitchell v. Bridgman, 71 Minn. 360.

9 Merchants' etc. Bank v. Stanton, 55 Minn. 211, 43 Am. St. Rep. 491; Fischer v. Johnson, 106 Iowa, 181.

10 See sec. 215 et seq.

11 See Merchants' Nat. Bank v. Stanton, 55 Minn. 211, 43 Am. St. Rep. 491; Tift v. Horton, 53 N. Y. 380, 13 Am. Rep. 537; Davenport v. Shants, 43 Vt. 546.

CHAPTER XXX.

DUTIES AND LIABILITIES OF LANDOWNERS,
GENERALLY.

- § 425. Duty of owner in use of lands, generally.
- § 426. Use of premises for a lawful trade or business.
- § 427. Duty of owner as regards safety of premises.
- § 428. Duty of owner in respect of trespassers.
- § 429. Same—Trespassing children.
- § 430. Liability of owner for negligence.
- § 431. Same—Liability in respect of fences, etc.
- § 432. Liability in respect of defective walls, etc.

§ 425. Duty of Owner in Use of Lands, Generally.

It is a familiar maxim of the law that one must so use and enjoy his own property as to interfere with the comfort and safety of others as little as possible, consistently with its proper use. Briefly stated, one must so use his property as not to injure his neighbor.¹ This principle, as a standard of conduct, is of universal application, and the failure to observe it is, in respect to those who have a right to invoke its protection, a breach of duty, and, in a legal sense, constitutes negligence.² The maxim which embodies

1 *Fish v. Dodge*, 4 Denio, 311, 47 Am. Dec. 254; *Barrett v. Southern Pac. Co.*, 91 Cal. 296, 25 Am. St. Rep. 186; *Bannon v. State*, 49 Ark. 167; *Beatrice Gas Co. v. Thomas*, 41 Neb. 662, 43 Am. St. Rep. 711.

2 *Barrett v. Southern Pac. Co.*, 91 Cal. 296, 25 Am. St. Rep. 186.

3 See *Hurlbut v. McKone*, 55 Conn. 31, 3 Am. St. Rep. 17; *Booth v. Rome etc. R. R. Co.*, 140 N. Y. 267, 37 Am. St. Rep. 552.

4 *Barnard v. Sherley*, 135 Ind. 547, 41 Am. St. Rep. 454; *Railroad Co. v. Eagles*, 9 Colo. 544; *Barrons v. Sycamore*, 150 Ill. 588, 41 Am. St. Rep. 400; *Gregory v. Layton*, 36 S. C. 93, 31 Am. St. Rep. 857; *Chesley v. King*, 74 Me. 164, 43 Am. Rep. 569; *Bjornson v. Saccone*, 88 Ill. App. 6.

5 See sec. 422, ante, and cases cited.

6 *Booth v. Rome etc. R. R. Co.*, 140 N. Y. 267, 37 Am. St. Rep. 552; *Panton v. Holland*, 17 Johns. 99, 8 Am. Dec. 369; *Thurston v. Hancock*, 12 Mass. 220, 7 Am. Dec. 57; *Schultz v. Byers*, 53 N. J. L. 442, 26 Am. St. Rep. 435; *Partridge v. Scott*, 3 Mees. & W. 220.

7 *Baird v. Williamson*, 15 Com. B., N. S., 376; *Wilson v. Waddell*, L. R. 2 App. Cas. 95; *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. St. 126, 57 Am. Rep. 445. And see *Hurdman v. Railway Co.*, L. R. 3 C. P. Div. 168; *Crompton v. Lea*, L. R. 19 Eq. 115; *Highway Commrs. v. Ely*, 54 Mich. 173.

8 *Andrews, C. J.*, in *Booth v. Rome etc. R. R. Co.*, 140 N. Y. 267, 37 Am. St. Rep. 552.

9 *Frost v. Berkeley Phosphate Co.*, 42 S. C. 402, 46 Am. St. Rep. 736.

10 *Frost v. Berkeley Phosphate Co.*, 42 S. C. 402, 46 Am. St. Rep. 736; and see, also, *Bohan v. Gas Light Co.*, 122 N. Y. 18; *Cahill v. Eastman*, 18 Minn. 324, 10 Am. Rep. 184; *Pennoyer v. Allen*, 56 Wis. 502, 43 Am. Rep. 728; *Susquehanna Fertilizer Co. v. Malone*, 73 Md. 268, 25 Am. St. Rep. 595; *Railroad Co. v. First Baptist Church*, 108 U. S. 317; *Attorney General v. Asylum*, L. R. 4 Ch. App. 147.

§ 426. Use of Premises for a Lawful Trade or Business.

The exclusive dominion which one has over his own property, enabling him to subject it to such uses as will subserve his wishes and private interests, is limited by the maxim, "*Sic utero tuo ut alienum non laedas.*" He is bound to have respect and regard for the rights of his neighbor.¹ A person may have upon his property any kind of lawful business, and so long as it is not a nuisance, and is not managed so as to become such, he is not responsible for any damage that his neighbor accidentally and unavoidably sustains.² But where, in itself, or from the manner in which the business is conducted, positive harm is inflicted, and the rights of others are materially affected and impaired, then the law will intervene to prevent a use by one of his own property which sensibly lessens or destroys the enjoyment by others of their own.³ The mere lawfulness of a trade or calling will not excuse or justify the destruction of or interference with the comfortable enjoyment of his property by another.⁴ If a trade or business is carried on in such a manner as to interfere with the reasonable and comfortable enjoyment by another of his property, or which occasions material injury to the property itself, an actionable wrong is done to the neighboring owner, and this, too, without regard to the locality where such business is carried on, and al-

though the business may be a lawful one, useful to the public, and although the best and most approved appliances and methods may be used in its conduct and management.⁵ Nor is it necessary to a right of action that the owner should be driven from his dwelling. It is enough that the enjoyment of life and property be rendered uncomfortable.⁶ But the rule is not applied with the same strictness in respect of business or trades which produce merely annoyance, thereby producing physical discomfort, but which are not hurtful in character, that is, injurious to health or life.⁷ So a distinction has been taken between the natural and necessary development of the land itself, and injuries resulting from the character of some business not incident and necessary to the development of the land, or the minerals or other substances lying within it. The owner of the land has the right to develop it by digging for minerals of various kinds, and if, in doing so, an injury occurs to the owner of adjoining lands, without fault or negligence on the former's part, an action for such injury cannot be maintained; otherwise, a man might be utterly deprived of the use of his property. It is not so, however, where the injury is caused by the prosecution of a business which has no necessary relation to the land itself, and is not essential to its development.⁸ In the development of land by irrigation, the law requires those in control of the matter to use judg-

ment, skill, care, and caution in the construction and maintenance of the means and appliances used, in order that their neighbors or others may not be injured. But they are required only to anticipate and prepare to meet such emergencies as may reasonably be expected to arise in the course of nature, and are not required to prepare to meet unlooked-for and overwhelming displays of adverse power, such as storms of such unusual violence as to surprise cautious and reasonable persons.⁹

1 See *Booth v. Rome etc. R. R. Co.*, 140 N. Y. 267, 37 Am. St. Rep. 552, and other cases cited in preceding section.

2 *Losee v. Buchanan*, 51 N. Y. 476, 10 Am. Rep. 623; *Fisher v. Clark*, 41 Barb. 329.

3 *Jaques v. National Exhibit Co.*, 15 Abb. N. C. 250; *Yocum v. Hotel Co.*, 18 Abb. N. C. 341; *Railroad Co. v. Franz*, 43 Ohio St. 623; *Davis v. Sawyer*, 133 Mass. 289, 43 Am. Rep. 519; *Bohan v. Gas Light Co.*, 122 N. Y. 18.

4 *Doellner v. Tynan*, 38 How. Pr. 176; *Hauck v. Tidewater Pipe Line Co.*, 153 Pa. St. 366, 34 Am. St. Rep. 710; *Tiffin v. McCormack*, 34 Ohio St. 638, 32 Am. Rep. 408.

5 *Susquehanna Fertilizer Co. v. Malone*, 73 Md. 268, 25 Am. St. Rep. 595; and see, also, *Meiners v. Miller etc. Co.*, 78 Wis. 364; *McKeon v. See*, 51 N. Y. 300, 10 Am. Rep. 659; *Bohan v. Gas Light Co.*, 122 N. Y. 18; *Frost v. Berkeley Phosphate Co.*, 42 S. C. 402, 46 Am. St. Rep. 736; *Rylands v. Fletcher*, L. R. 3 Eng. & Ir. App. 330.

6 *Campbell v. Seaman*, 63 N. Y. 568, 20 Am. Rep. 567; *Cogswell v. New York etc. R. R. Co.*, 103 N. Y. 10, 57 Am. Rep. 701; *Fort Worth v. Crawford*, 74 Tex. 404, 15 Am. St. Rep. 840; *Westcott v. Middleton*, 43 N. J. Eq. 478; *St. Helen's Smelting Co. v. Tipping*, 11 H. L. Cas. 642.

7 *Seacord v. People*, 121 Ill. 623.

8 Hauck v. Tidewater Pipe Line Co., 153 Pa. St. 366, 34 Am. St. Rep. 710.

9 Lisonbee v. Monroe Irrigation Co., 18 Utah, 343, 72 Am. St. Rep. 784; North Point etc. Co. v. Canal Co., 16 Utah, 246, 67 Am. St. Rep. 607; Jordan v. Mt. Pleasant, 15 Utah, 440.

§ 427. Duty of Owner as Regards Safety of Premises.

Where the owner of land, expressly or by implication, invites others to come upon his premises, whether for business or any other purpose, it is his duty to be reasonably sure that he is not inviting them into danger, and to that end he must exercise ordinary care and prudence to render the premises reasonably safe for the visit.¹ He is not an insurer of the premises against accidents from their condition, but, so far as he is able to do so by the exercise of ordinary care and vigilance, he is bound to keep them in such a condition that persons who are rightfully using them will not be injured by any insecurity or insufficiency for the purpose to which they are put. Failing in his duty in this respect, the owner or occupant of the premises becomes a wrongdoer, and as such will be liable for any injury which results as a natural consequence from his misconduct.² But it is held that this duty does not extend so far as to make such occupant or owner responsible for the unsafe condition of those parts of his premises not intended for the reception of visitors or customers, and where they are not ex-

pected to go, nor must he render his premises safe for any purpose for which he cannot reasonably anticipate they will be used.³ Thus it was held that the proprietor of a grain elevator incurred no liability for injuries to a customer occasioned by the giving way of a railing about an elevated platform, although he knew its defective condition, where the customer, at the time of the accident, was putting the railing to a use other than that for which it was intended, by leaning against it for support.⁴ The owner of land and of buildings assumes no duty to one who is on his premises by permission only, and as a mere licensee, except that he will refrain from willful or affirmative acts which are injurious. Such licensee goes there at his own risk, and enjoys the license subject to its concomitant perils.⁵ The law imposes no duty upon an owner or occupant to keep his premises in a suitable condition for those who come there for their own convenience merely, without any invitation, either express or which may fairly be implied from the preparation and adaptation of the premises for the purposes for which they are appropriated.⁶ And it was held that one who entered on the defendant's premises seeking employment from the latter was a mere licensee, and that the defendant was not liable to him for an injury caused by the unsafe condition of the place.⁷ The owner of a private house is not liable to invited visitors on lawful business

for injuries occasioned by latent defects which are either concealed in defective workmanship, or are incidental to the ordinary wear and tear of houses, and are not discoverable by any ordinary care or diligence.⁸ It is the duty of a property owner who has constructed a grating in a sidewalk, as long as he owns and has full possession of the premises, to use reasonable diligence to keep the grating in repair, so that it shall be as safe as any other part of the sidewalk.⁹

1 *Ryder v. Kinsey*, 62 Minn. 85, 54 Am. St. Rep. 623; *Hayward v. Merrill*, 94 Ill. 349, 34 Am. Rep. 229; *Beehler v. Daniels*, 18 R. I. 563, 49 Am. St. Rep. 790; *Atlanta etc. Oil Mills v. Coffey*, 80 Ga. 145, 12 Am. St. Rep. 214.

2 *Mullen v. St. John*, 57 N. Y. 567, 15 Am. Rep. 530; *Bausier v. Railroad Co.*, 32 Minn. 331; *Nickerson v. Tirrell*, 127 Mass. 236; *Lowe v. Salt Lake City*, 13 Utah, 91, 57 Am. St. Rep. 708; *Bennett v. Railroad Co.*, 102 U. S. 577.

3 *Armstrong v. Medbury*, 67 Mich. 250, 11 Am. St. Rep. 585; *Schmidt v. Bauer*, 80 Cal. 565.

4 *Kinney v. Onsted*, 113 Mich. 96, 67 Am. St. Rep. 455; and see, to same effect, *Stickney v. Salem*, 3 Allen, 374; *Orcutt v. Bridge Co.*, 53 Me. 500.

5 *Sweeny v. Old Colony etc. R. R. Co.*, 10 Allen, 368, 87 Am. Dec. 644; *Clark v. Railroad Co.*, 113 Mich. 24, 67 Am. St. Rep. 442; *Plummer v. Dill*, 156 Mass. 426, 32 Am. St. Rep. 463; *Gibson v. Leonard*, 143 Ill. 182, 36 Am. St. Rep. 376; *Schmidt v. Bauer*, 80 Cal. 565; *O'Neil v. Railway Co.*, 101 Mich. 437; *Moffatt v. Kenny*, 174 Mass. 311, 315.

6 *Marwedel v. Cook*, 154 Mass. 235.

7 *Larmore v. Iron Co.*, 101 N. Y. 391, 54 Am. Rep. 718.

8 *Baddeley v. Shea*, 114 Cal. 1, 55 Am. St. Rep. 56; and see *Mars v. Canal Co.*, 54 Hun, 625; *Loftus v. Union Ferry Co.*, 22 Hun, 33, 84 N. Y. 455, 38 Am. Rep. 533;

Hoffman v. Dickinson, 31 W. Va. 152; *Hobbs v. Stauer*, 62 Wis. 108; *Lunney v. The Concord*, 58 Fed. Rep. 913. Compare *Steppe v. Alter*, 48 La. Ann. 363, 55 Am. St. Rep. 281.

9 *Canandagua v. Foster*, 156 N. Y. 354, 66 Am. St. Rep. 575, and note; *Wolf v. Kilpatrick*, 101 N. Y. 146, 54 Am. Rep. 672; *Jennings v. Van Schaick*, 108 N. Y. 530, 2 Am. St. Rep. 459.

§ 428. Duty of Owner in Respect of Trespassers.

It is a well-settled principle of law that a landowner is under no obligation to keep his premises in a safe condition for the benefit of trespassers, or those who may go upon them uninvited from motives of private convenience in no way connected with the owner.¹ The exceptions to the general rule arise when the owner maintains on his land something in the nature of a trap or other concealed danger, known to him and of which he has given no warning, and also when there has been something in the nature of a wanton injury to a trespasser, as where the owner had set spring guns on his premises by which the trespasser had been shot.² And after the presence of a trespasser is known to the owner of the premises, he is bound to exercise ordinary care to avoid injury to him.³ But the broad doctrine well sustained by authority is, that a trespasser on the premises of another ordinarily assumes all risk of danger from the condition of the premises, and cannot recover for an injury happening to him, without showing that it was wantonly inflicted, or that

the owner, being present and acting, might have prevented the injury by the exercise of reasonable care after discovering the danger.⁴ The maxim that a man must use his property so as not to incommode his neighbor only applies to neighbors who do not interfere with it or enter upon it. To hold the owner liable for consequential damages happening to trespassers from the lawful and beneficial use of his own land would be an unreasonable restriction of his enjoyment of it.⁵ Nor is a landowner liable for injuries received by animals trespassing on his premises on account of such premises being in a dangerous condition, and not being kept in proper and safe repair.⁶ A railway company has the right to a reasonable use of its land, in which respect it stands on the same plane as a private person. And where such company permits a person to come upon its premises for his own interest, convenience, or gratification, and not upon any business connected with the company, it owes him no duty other than that of not willfully or wantonly injuring him, for he is but a mere licensee, who accepts the license subject to its attendant risks and perils.⁷ And it is held that if a trespasser, or even licensee, in passing over a railroad track, on the unfenced grounds of the company, is tripped by a semaphore wire and hurt, the company is not liable for the injury.⁸ A landowner whose possession is unlawfully and wrongfully entered upon by a third per-

son may lawfully remove the trespasser and any structures he may have erected on the land, using such force as may be necessary for the purpose. And even though, in so doing, he commits a breach of the peace, it will not render him liable to the intruder in an action of trespass.⁹ And a railroad company has the same right belonging to every owner of real estate to exclude from entry upon it all who come without its consent and can show no superior legal title.¹⁰

1 *Pekin v. McMahon*, 154 Ill. 141, 45 Am. St. Rep. 114; *Railway Co. v. Ferguson*, 57 Ark. 16, 38 Am. St. Rep. 217; *Dobbins v. Railway Co.*, 91 Tex. 60, 66 Am. St. Rep. 856; *Moran v. Palace Car Co.*, 134 Mo. 641, 56 Am. St. Rep. 543; *O'Leary v. Elevator Co.*, 7 N. Dak. 554; *Faris v. Hoberg*, 134 Ind. 269, 39 Am. St. Rep. 261.

2 *Peters v. Bowman*, 115 Cal. 345, 56 Am. St. Rep. 106.

3 *Lowe v. Salt Lake City*, 13 Utah, 91, 57 Am. St. Rep. 708; and see *O'Leary v. Elevator Co.*, 7 N. Dak. 554; *Daley v. Railroad Co.*, 26 Conn. 591, 68 Am. Dec. 413; *Marble v. Ross*, 124 Mass. 44; *Columbus etc. R. R. Co. v. Wood*, 86 Ala. 164; *Louisville etc. R. R. Co. v. Coleman*, 86 Ky. 556.

4 *Pierce v. Whitcomb*, 48 Vt. 127, 21 Am. Rep. 120; *Gavin v. Chicago*, 97 Ill. 66, 37 Am. Rep. 99; *Gramlich v. Wurst*, 86 Pa. St. 74, 27 Am. Rep. 684; *Gillespie v. McGowen*, 100 Pa. St. 144, 45 Am. Rep. 365; *Pittsburgh etc. R. R. Co. v. Bingham*, 29 Ohio St. 367, 23 Am. Rep. 751; *Morgan v. Hallowell*, 57 Me. 375; *Clark v. Manchester*, 62 N. H. 577; *Severy v. Nickerson*, 120 Mass. 306, 21 Am. Rep. 514; *Frost v. Eastern R. R.*, 64 N. H. 220, 10 Am. St. Rep. 396; *Galveston Oil Co. v. Morton*, 70 Tex. 400, 8 Am. St. Rep. 611; *Walsh v. Fitchburg R. R. Co.*, 145 N. Y. 301, 45 Am. St. Rep. 615.

5 *Knight v. Abert*, 6 Pa. St. 472, 47 Am. Dec. 478.

6 *Knight v. Abert*, 6 Pa. St. 472, 47 Am. Dec. 478; *Gilman v. Railway Co.*, 62 Iowa, 299; *Hughes v. Rail-*

way Co., 66 Mo. 325; *Railway Co. v. Ferguson*, 57 Ark. 16, 38 Am. St. Rep. 217. See *Hurd v. Lacy*, 93 Ala. 427, 30 Am. St. Rep. 61.

7 *Pomponio v. New York etc. R. R. Co.*, 66 Conn. 528, 50 Am. St. Rep. 124; *Woolwine v. Chesapeake etc. Ry. Co.*, 36 W. Va. 329, 32 Am. St. Rep. 859. Case of licensee and that of a party invited, in respect to the duty of keeping the premises safe for their use, distinguished: See *Plummer v. Dill*, 156 Mass. 426, 32 Am. St. Rep. 463; *Byrne v. New York etc. R. R. Co.*, 104 N. Y. 362, 58 Am. Rep. 512.

8 *Clark v. Michigan Cent. R. R. Co.*, 113 Mich. 24, 67 Am. St. Rep. 442; and see *Sturgis v. Railway Co.*, 72 Mich. 619.

9 *Lyon v. Fairbank*, 79 Wis. 455, 24 Am. St. Rep. 732; and see sec. 412, ante.

10 *New York etc. R. R. Co. v. Scovill*, 71 Conn. 136, 71 Am. St. Rep. 159.

§ 429. Same—Trespassing Children.

The owner of land is not required to provide against remote and improbable injuries to children trespassing thereon. But the doctrine has been maintained that he is liable for injuries to children trespassing upon his private grounds, when it is known to him that they are accustomed to go upon it, and that, from the peculiar nature and exposed and open condition of something thereon which is attractive to children, he ought reasonably to anticipate such an injury to a child as that which actually occurs. This doctrine is declared at length and applied in a series of cases known as the "turntable cases," wherein railroad companies have been held liable for injuries sustained by children while playing upon or around

turntables by reason of the fact that the turntables were left unfastened and unguarded.¹ The application of the doctrine is not, however, restricted to this one line of cases. It has been applied where the dangerous object was a signal torpedo;² where the injury to the child was caused by a gate;³ where the child was scalded in a pool of water;⁴ where the child was drowned in a deep pit filled with water and floating timbers;⁵ where the injury was caused by falling into an excavation made by the city;⁶ where the injury was caused by an elevator worked by steam;⁷ and where the death of a child was caused by the falling of lumber, piled upon an open, unfenced lot, that children had been in the habit of frequenting.⁸ But some of the courts have refused to follow the principle of the "turntable cases," and decline to adopt the doctrine that the owner of machinery or other property attractive to children is liable for injuries happening to children wrongfully interfering with it on his own premises. Thus it is held by the court of appeals of New York that a railway maintaining a turntable upon land which the public is in the habit of crossing and being upon at pleasure, but not by invitation, does not owe the duty to children to keep such turntable fastened or locked when not in use, so as to prevent access to it by children. If it is on the land of the owner, and is used by him for the sole purpose of conducting his business, and is

fit and proper for that purpose, and is not built in any improper or negligent way with reference to the transaction of his business, he does not owe any further duty to persons, whether children or adults, who have no business on his land, and who are there unasked, and whose presence is merely tolerated.⁹ And the courts of last resort, including even those which recognize the doctrine of the "turntable cases," have, with but few exceptions, denied the liability of a landowner for injuries to trespassing children by reason of open and unguarded ponds and excavations upon his premises.¹⁰ And it is held that the owner of a city lot on which he is constructing a building incurs no liability for injury to a trespassing child caused by the falling of building stone while playing on the lot without the knowledge of the owner, and without any express or implied invitation or inducement to enter upon the premises.¹¹ And so where a trespassing child was injured by attempting to get upon the ladder of a moving freight-car.¹²

1 See *Sioux City etc. R. R. Co. v. Stout*, 17 Wall. 657; *Ilwaco etc. Nav. Co. v. Hedrick*, 1 Wash. 446, 22 Am. St. Rep. 169; *Keffe v. Milwaukee etc. R. R. Co.*, 21 Minn. 207, 18 Am. Rep. 393; *O'Malley v. Railroad Co.*, 43 Minn. 289; *Nagel v. Railroad Co.*, 75 Mo. 653, 42 Am. Rep. 418; *Union Pac. Ry. Co. v. Dunden*, 37 Kan. 1; *Barrett v. Southern Pac. Co.*, 91 Cal. 296, 25 Am. St. Rep. 186; *Kansas etc. R. R. Co. v. Fitzsimmons*, 22 Kan. 686, 31 Am. Rep. 203; *Fort Worth etc. R. R. Co. v. Measles*, 81 Tex. 474; *Callahan v. Railroad Co.*, 92 Cal.

89; *Ferguson v. Railroad Co.*, 77 Ga. 102; *Pittsburg etc. Ry. Co. v. Caldwell*, 74 Pa. St. 421.

2 *Railway Co. v. Shields*, 47 Ohio St. 387, 21 Am. St. Rep. 840; *Harriman v. Railroad Co.*, 45 Ohio St. 11, 4 Am. St. Rep. 507; and see *Powers v. Harlow*, 53 Mich. 507, 51 Am. Rep. 154.

3 *Birge v. Gardiner*, 19 Conn. 507, 50 Am. Dec. 261.

4 *Brinkley Car Co. v. Cooper*, 60 Ark. 545, 46 Am. St. Rep. 216; and see, also, *Penso v. McCormick*, 125 Ind. 116, 21 Am. St. Rep. 211.

5 *Pekin v. McMahon*, 154 Ill. 141, 45 Am. St. Rep. 114.

6 *Mackey v. Vicksburg*, 64 Miss. 777.

7 *Mullaney v. Spence*, 15 Abb. Pr., N. S., 319; but compare *O'Leary v. Elevator Co.*, 7 N. Dak. 554.

8 *Bransom v. Labrot*, 81 Ky. 638, 50 Am. Rep. 193. But see *Vanderbeck v. Hendry*, 34 N. J. L. 467.

9 *Walsh v. Railroad Co.*, 145 N. Y. 301, 45 Am. St. Rep. 615, reversing 78 Hun, 1. So held, also, in *Frost v. Eastern R. R. Co.*, 64 N. H. 220, 10 Am. St. Rep. 396; *Daniels v. Railroad Co.*, 154 Mass. 349, 26 Am. St. Rep. 253; and see *McAlpin v. Powell*, 70 N. Y. 126, 26 Am. Rep. 555; *Bates v. Railway Co.*, 90 Tenn. 36, 25 Am. St. Rep. 665; *O'Leary v. Elevator Co.*, 7 N. Dak. 554; *Bishop v. Railway Co.*, 14 R. I. 320, 51 Am. Rep. 386; *Gay v. Railway Co.*, 159 Mass. 238, 38 Am. St. Rep. 415.

10 *Peters v. Bowman*, 115 Cal. 345, 56 Am. St. Rep. 106; *Dobbins v. Railway Co.*, 91 Tex. 60, 66 Am. St. Rep. 856; *Moran v. Pullman Palace Car Co.*, 134 Mo. 641, 56 Am. St. Rep. 543; *Ovenholt v. Vieths*, 93 Mo. 422, 3 Am. St. Rep. 557; *Gillespie v. McGowen*, 100 Pa. St. 144, 45 Am. Rep. 365; *Ritz v. Wheeling*, 45 W. Va. 262; *Omaha v. Bowman*, 52 Neb. 293, 66 Am. St. Rep. 506; *Hargreaves v. Deacon*, 25 Mich. 1; *Klix v. Nieman*, 68 Wis. 271, 60 Am. Rep. 854; *Stendal v. Boyd*, 73 Minn. 53, 72 Am. St. Rep. 597. Contra, *Pekin v. McMahon*, 154 Ill. 141, 45 Am. St. Rep. 114; *Price v. Atchison Water Co.*, 58 Kan. 551, 62 Am. St. Rep. 625.

11 *Witte v. Stifel*, 126 Mo. 295, 47 Am. St. Rep. 668; and so, to same effect, *Mergenthaler v. Kirby*, 79 Md. 182, 47 Am. St. Rep. 371; *McGuinness v. Butler*, 159

Mass. 233, 38 Am. St. Rep. 412; O'Leary v. Elevator Co., 7 N. Dak. 554.

12 Underwood v. Railroad Co., 105 Ga. 48.

§ 430. Liability of Owner for Negligence.

Negligence implies fault, and cannot be predicated of a lawful and customary use of one's own premises.¹ But one must so use his own property as to interfere with the comfort and safety of others as little as possible, consistently with its proper use.² This principle, as a standard of conduct, is of universal application, and the failure to observe it is, in respect to those who have a right to invoke its protection, a breach of duty, and, in a legal sense, constitutes negligence.³ But a landowner is not liable for every injury that may occur to another when on his premises, in the absence of any evidence that such injury was the result of the negligence of the owner. And where one is injured when lawfully upon the premises of another, but does not show either the direct cause of the injury, or that it occurred through the negligence of the owner, he is not entitled to recover damages for the injury.⁴ Proof of the mere fact that an accident has happened will not, in the absence of any contractual relations between the parties, authorize an inference of negligence.⁵ The measure of duty of persons occupying real property for business purposes is reasonable prudence and care, and the law does not require a warranty of the safety of those

coming upon their premises.⁶ Thus, if the appliances of a merchant are not placed so as to threaten danger to those visiting his store on business, and are in full sight and within the observation of everyone, the merchant is not liable for accidents which result from carelessness and inattention to the surroundings.⁷ A person has a right to kindle a fire on his own land for the purpose of husbandry, if he does it at a proper time and in a suitable manner, and uses reasonable care and diligence to prevent its spreading and doing injury to the property of others. If, however, he is guilty of negligence in taking care of it, and the fire spreads and injures the property of another in consequence of such negligence, he is liable in damages for the injury done.⁸

1 *Alpern v. Churchill*, 53 Mich. 607; *Montgomery v. Booming Co.*, 88 Mich. 633, 26 Am. St. Rep. 308.

2 See sec. 426, ante.

3 *Barrett v. Southern Pac. Co.*, 91 Cal. 296, 25 Am. St. Rep. 186; and see *Caniff v. Navigation Co.*, 66 Mich. 638, 11 Am. St. Rep. 541.

4 *Huey v. Gahlenbeck*, 121 Pa. St. 238, 6 Am. St. Rep. 790, and note; *Jansen v. Varnum*, 89 Ill. 100; *Bjornson v. Saccone*, 88 Ill. App. 6.

5 *Cosulich v. Standard Oil Co.*, 122 N. Y. 118, 19 Am. St. Rep. 475; *Huff v. Austin*, 46 Ohio St. 386, 15 Am. St. Rep. 613; *Young v. Bransford*, 12 Lea, 232.

6 *Hart v. Grennell*, 122 N. Y. 371; and see sec. 427, ante.

7 *Larkin v. O'Neill*, 119 N. Y. 221.

8 *Hewey v. Nourse*, 54 Me. 256; *Brummit v. Furness*, 1 Ind. App. 401, 50 Am. St. Rep. 215, and note; and see

Webb v. Railroad Co., 49 N. Y. 420, 10 Am. Rep. 389; Louisville etc. Ry. Co. v. Nitsche, 126 Ind. 229, 22 Am. St. Rep. 582.

§ 431. Same—Liability in Respect of Fences, etc.¹

At common law, the owner of cattle is bound to keep them within his own lines, and if he suffers them to go at large, and they stray upon the premises of his neighbor, they are clearly trespassers, and he is liable for whatever damage they may commit, and, as a general rule, he cannot recover for injuries received by them, while thus wrongfully on his neighbor's premises.² And this rule still prevails in some of the states, except in so far as changed by statute.³ But it is held by the courts in other states that the rule of the common law has never been in force within their respective jurisdictions, and, except where the rule is changed by statute, uninclosed lands are regarded as common of pasturage, over which cattle or stock may be suffered to run at large, and if the owner of the land desires to protect himself against damage, he must erect and maintain a lawful fence around them.⁴ Fences are treated for the most part as guards against intrusion, and may be composed of any material which will present a sufficient obstruction.⁵ They are always good enough at common law if they serve the end of keeping one's own cattle inclosed, and are always

insufficient if they fail to effect that purpose.⁶ A gate in a fence is to be regarded as a part of the fence.⁷ The common law requires one who builds a fence to maintain it in a condition reasonably safe to his neighbors, or to others who may rightfully approach it or come in contact with it, and if he negligently fails to do so he is responsible for the natural and probable consequences.⁸ A division line fence must be so built as to size, height, and character, and kind of materials, that it will be proper and suitable for all the purposes of such fence, and will be reasonably safe, and not necessarily cause injury to the adjoining owner or his property or animals;⁹ otherwise, the fence is a nuisance, rendering the owner who erects and maintains it liable for the injury sustained.¹⁰ If the duty to maintain a division fence rests upon one of two adjoining owners exclusively, the other is not liable to a third person for a personal injury caused by the fall of the fence, nor is the former so liable if he used the care of a prudent man in maintaining the fence.¹¹ The act of a landowner in erecting upon his property a barbed-wire fence is not per se negligence, and does not in itself render him liable to one who sustains an injury therefrom.¹² But the manner in which such fence is constructed and maintained may be such as to make the person erecting and maintaining it guilty of negligence. And if he maintains it in so negli-

gent a manner that the animals of another lawfully pasturing on adjoining premises become entangled in the wires and are injured, without the fault of their owner, the party so constructing the fence is liable in damages for the injury.¹³

Where a railway company places a barbed-wire fence along its right of way, and suffers it to become out of repair so that stray animals may pass through and enter upon the right of way the company is not liable for injuries to such trespassing animals from their being frightened by passing trains and caused to run on and become wounded by such fence.¹⁴ Under a statute authorizing hedges as partition fences, but making no provision as to trimming them, the owner is not liable to the adjoining owner for allowing them to grow so that his land is shaded and encroached on thereby, it being a clear case of *damnum absque injuria*.¹⁵ If a person erects a wire fence upon another's land without his consent, it becomes part of the realty, and such person parts with his ownership of the materials entering into the fence and has no further right thereto.¹⁶

1 See sec. 415, ante.

2 See *Ellis v. Loftus Iron Co.*, L. R. 10 Com. P. 10; *Erskine v. Adcane*, L. R. 8 Ch. 756; *Binks v. Railway Co.*, 3 Best & S. 244.

3 See *Lord v. Wormwood*, 29 Me. 282. 50 Am. Dec. 586; *Webber v. Closson*, 35 Me. 26; *Amstein v. Gardner*, 132 Mass. 28, 42 Am. Rep. 421; *Locke v. Railway Co.*, 15 Minn. 350; *Lawrence v. Combs*, 37 N. H. 337, 72 Am. Dec. 332; *Castner v. Riegel*, 54 N. J. L. 498; *Crandall v.*

Eldridge, 46 Hun, 411; Phillips v. Covell, 79 Hun, 210; Strickland v. Geide, 31 Or. 373; Milligan v. Wehinger, 68 Pa. St. 235; Bostwick v. Railway Co., 2 N. Dak. 440; Carpenter v. Cook, 67 Vt. 102; Pittsburgh etc. R. R. Co. v. Stuart, 71 Ind. 500; Sisk v. Crump, 112 Ind. 504, 2 Am. St. Rep. 213; Vandegrift v. Railway Co., 2 Houst. 297; Curry v. Railway Co., 43 Wis. 682; Osborne v. Kimball, 41 Kan. 187; Robinson v. Railroad Co., 79 Mich. 323, 19 Am. St. Rep. 174.

4 Rowe v. Baber, 93 Ala. 422; Wilhite v. Speakman, 79 Ala. 400; Jones v. Nichols, 46 Ark. 207, 55 Am. Rep. 575; Merritt v. Hill, 104 Cal. 184; Nuckolls v. Gaut, 12 Colo. 361; Campbell v. Railroad Co., 50 Conn. 128; Railroad Co. v. Geiger, 21 Fla. 669, 58 Am. Rep. 697; Railroad Co. v. Neely, 56 Ga. 540; Railroad Co. v. Simmons, 85 Ky. 151; Demetz v. Benton, 35 Ill. App. 559; D'Arcy v. Miller, 86 Ill. 102, 29 Am. Rep. 11; McNeer v. Boone, 52 Ill. App. 181; Harrison v. Adamson, 76 Iowa, 337; Anderson v. Locke, 64 Miss. 283; Canefox v. Crenshaw, 24 Mo. 199, 69 Am. Dec. 427; Hughes v. Railroad Co., 66 Mo. 327; Runyan v. Patterson, 87 N. C. 343; Railroad Co. v. Stephenson, 24 Ohio St. 48; Fennell v. Railroad Co., 70 Tex. 670; Baylor v. Railroad Co., 9 W. Va. 270; and see Buford v. Houtz, 133 U. S. 320.

5 Allen v. Tobias, 77 Ill. 169; and see Kimball v. Carter, 95 Va. 84; Darst v. Enlow, 116 Ill. 475; Davis v. Davis, 70 Tex. 123.

6 Jackson v. Railroad Co., 25 Vt. 150, 158, 60 Am. Dec. 246; and see Gould v. Railway Co., 82 Me. 122; Leggett v. Railroad Co., 72 Ill. App. 577.

7 Estes v. Railroad Co., 63 Me. 308; Railroad Co. v. O'Brien, 34 Ill. App. 155.

8 Durgin v. Kennett, 67 N. H. 329; Firth v. Bowling Iron Co., 3 C. P. Div. 254.

9 Rowland v. Baird, 18 Abb. N. C. 256.

10 Rowland v. Baird, 18 Abb. N. C. 256; Lowe v. Guard, 11 Ind. App. 472, 54 Am. St. Rep. 511, and note.

11 Quinn v. Crimmings, 171 Mass. 255, 68 Am. St. Rep. 420.

12 Sisk v. Crump, 112 Ind. 504, 2 Am. St. Rep. 213; Worthington v. Wade, 82 Tex. 26; Golden v. Coonan, 107 Iowa, 209.

13 *Lowe v. Guard*, 11 Ind. App. 472, 54 Am. St. Rep. 511; *McFarland v. Swihart*, 11 Ind. App. 175, 54 Am. St. Rep. 499; *Loveland v. Gardner*, 79 Cal. 317; *Roney v. Aldrich*, 44 Hun, 320; *Hurd v. Lacy*, 93 Ala. 427, 30 Am. St. Rep. 61.

14 *Railway Co. v. Ferguson*, 57 Ark. 16, 38 Am. St. Rep. 217; and see *Railway Co. v. Kirksey*, 48 Ark. 366; *St. Louis etc. R. R. Co. v. Fairbairn*, 48 Ark. 493.

15 *Kinney v. Kinney*, 104 Iowa, 703.

16 *Ebersol v. Trainor*, 81 Ill. App. 645.

§ 432. Liability in Respect of Defective Walls, etc.

It is held that the owner of a building will not be liable for damages caused by the falling of the walls of the building unless it appears that the danger was so obvious that a reasonable and prudent man would, on being informed thereof, have taken immediate measures to repair the walls.¹ The owner of a building on the side of a public alley in a city who negligently permits the walls thereof, weakened and made dangerous by fire, to remain unsupported, is liable to the owner of a building on the opposite side of the alley for injury thereto caused by the ruined walls falling upon it, and this is so although the city marshal volunteered to take charge of the walls and the owner assented.² So it is held that a ruined or dilapidated wall is as much a nuisance, if it imperils the safety of passengers or travelers on a public street or highway, as a ditch, or a pitfall dug by its side.³ One who constructs a chimney so that

if it falls it will fall upon and injure adjoining premises is bound to so construct it that it will withstand any gales which, from past experience, are reasonably to be expected in that locality. And negligence will be presumed in the building and maintaining of a chimney when it falls, unless as a result of inevitable accident, or the wrongful acts of third persons which the owner could not reasonably anticipate.⁴ It is not negligence on the part of a lot owner in building a cellar wall not to build so as to keep out sewage, when he has no knowledge that the sewer will leak.⁵

1 *Schwartz v. Gilmore*, 45 Ill. 454, 92 Am. Dec. 227; and see *Mahoney v. Libbey*, 123 Mass. 20, 25 Am. Rep. 6.

2 *Anderson v. East*, 117 Ind. 126, 10 Am. St. Rep. 35.

3 *Murray v. McShane*, 52 Md. 217, 36 Am. Rep. 367.

4 *Cork v. Blossom*, 162 Mass. 330, 44 Am. St. Rep. 362; and see, to same effect, *Gray v. Harris*, 107 Mass. 492, 9 Am. Rep. 61; *Smethurst v. Barton Square Church*, 148 Mass. 261, 12 Am. St. Rep. 550; *Mullen v. St. John*, 57 N. Y. 567, 15 Am. Rep. 530; *Tiffin v. McCormack*, 34 Ohio St. 638, 32 Am. Rep. 408; *Lawrence v. Jenkins*, L. R. 8 Q. B. 274.

5 *Allen v. Boston*, 159 Mass. 324, 38 Am. St. Rep. 423.

CHAPTER XXXI.

TRESPASS.

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§ 433. Trespass to Land, What is.

Every entry upon the land of another without license, and without express or implied permis-

sion from the owner, is a trespass, whether the land be inclosed or not and whether appreciable damage be done or not.¹ Nor is it material as regards the nature of the offense that the land wrongfully entered upon is covered with water;² nor that the person wrongfully entering did not intend to commit a trespass.³ The gist of the action for a trespass is the wrongful entry and it has been held a trespass even to enter the land of another, without his consent, to take one's own personal property.⁴

1 *Norvell v. Gray*, 1 Swan, 96; *McCall v. Capehart*, 20 Ala. 521; *Pierce v. Hosmer*, 66 Barb. 345; *Hatch v. Donnell*, 74 Me. 163; *Agnew v. Jones*, 74 Miss. 347.

2 *Smith v. Ingram*, 7 Ired. 175.

3 *Hazelton v. Week*, 49 Wis. 661, 35 Am. Rep. 796; *Dexter v. Cole*, 6 Wis. 319, 70 Am. Dec. 465; *Stanhrough v. Cook*, 86 Iowa, 740. Compare *Benton v. Beattie*, 63 Vt. 186.

4 *Newkirk v. Sabler*, 9 Barb. 652; *Heermance v. Vernoy*, 6 Johns. 5; *Blake v. Jerome*, 14 Johns. 406; and see, to same effect, *Welborn v. Spears*, 32 Miss. 138; *Fischer v. Johnson*, 106 Iowa, 182; *Patchen v. Keeley*, 19 Nev. 408. Compare *Grim v. Robinson*, 31 Neb. 540; and sec. 436, post.

§ 434. Same—What Amounts to—Instances.

If one of two adjoining owners of lands cuts and destroys a tree standing directly upon the line between them, it is a trespass.¹ So one who, by means of a spout, sheds and throws the water from his building upon the land of an adjoining owner is guilty of trespass.² So the taking of possession of land by a railroad company and

using it, against the owner's consent, and without making compensation, is a trespass.³ So persons whose duty it is to run a drain under drain proceedings must keep within the limits of the land condemned and, if they throw out dirt upon adjacent land, it is a trespass.⁴ The mere finding of bees in a tree on the land of another person gives the finder no right to the bees or to the tree,⁵ and in cutting down the tree and taking the bees, he is guilty of a trespass.⁶ The fee remains in the owner of lands through which a highway runs, and such owner may maintain an action of trespass against one who puts his cattle upon the highway to graze, or who makes use of the road for any purpose other than to use it for passing and repassing.⁷ So, if one drives his cattle upon another's land through a breach in the fence, which has been blown down without the owner's fault, he is liable for the damage done by the trespassing cattle.⁸ An improper use of one's own premises resulting in injury to the land of an adjoining owner, is a trespass.⁹ A statute directing the killing of dogs "at large," or "whenever and wherever found" without license or collar, gives no authority to enter upon a private close in order to carry out the purposes of the statute, and one thus entering without the owner's consent, express or implied, is guilty of trespass.¹⁰

1 *Dubois v. Beaver*, 25 N. Y. 123, 82 Am. Dec. 326; *Griffin v. Bixby*, 12 N. H. 454, 37 Am. Dec. 225.

2 *Conner v. Woodfill*, 126 Ind. 85, 22 Am. St. Rep. 568; and see *Lynch v. Mayor etc.*, 76 N. Y. 60, 32 Am. Rep. 271.

3 *Baltimore etc. R. R. Co. v. Lee*, 75 Md. 596; *Keil v. Gas Co.*, 131 Pa. St. 466, 17 Am. St. Rep. 823; and see, to same effect, *Uline v. Railroad Co.*, 101 N. Y. 98, 54 Am. Rep. 661; *Lord v. Water Co.*, 135 Pa. St. 122, 20 Am. St. Rep. 864; *Macey v. Carter*, 76 Mo. App. 490.

4 *Clark v. Wiles*, 54 Mich. 323.

5 *Merrills v. Goodwin*, 1 Root, 209; *Gillet v. Mason*, 7 Johns. 16.

6 *State v. Repp*, 104 Iowa, 305, 65 Am. St. Rep. 463.

7 *Dubuque v. Maloney*, 9 Iowa, 451, 74 Am. Dec. 358, and note; *Cole v. Drew*, 44 Vt. 49, 8 Am. Rep. 363; *Huffman v. State*, 21 Ind. App. 449, 69 Am. St. Rep. 368; *Williams v. Railroad Co.*, 16 N. Y. 97, 69 Am. Dec. 651; *People v. Foss*, 80 Mich. 559, 20 Am. St. Rep. 532; and see *Burnham v. Hotchkiss*, 14 Conn. 311; sec. 420, ante.

8 *Erbes v. Wehmeyer*, 69 Iowa, 85.

9 See, in illustration of the principle, *Farrand v. Marshall*, 19 Barb. 380; *Hay v. Cohoes Co.*, 2 N. Y. 159, 51 Am. Dec. 279; *Van Hoesen v. Coventry*, 10 Barb. 518.

10 *Kerr v. Seaver*, 11 Allen, 151; *Bishop v. Fahay*, 15 Gray, 61; *McAuliffe v. Gash*, 17 R. L. 355; and see *Cozzens v. Nason*, 109 Mass. 275.

§ 435. Entries Upon Land not Amounting to Trespass.

One who has a legal right of entry upon the land of another is guilty of no trespass by entering without the consent of the occupant;¹ and he may use such force as is necessary, and is liable only in case he uses excessive force.² It is not a trespass for a landowner to demolish a build-

ing or other structure erected on his land without permission.³ Nor is it a trespass to destroy a building, during a fire, to save adjacent buildings, when done in good faith under apparent necessity.⁴ Breaking through the partition wall of an adjoining mine is not necessarily a trespass, if not incident to an encroachment upon the latter's premises.⁵ One going from the highway upon adjoining land, because of the impassable condition of the highway, is not guilty of trespass if he does no unnecessary damage.⁶ So an entry upon the seabeach of another, for the purpose of restoring to its owner a boat cast ashore by a storm and in danger of being carried off by the sea, is not a trespass.⁷ Nor is it a trespass to disturb a thatch in digging for clams on the shores of tide water, between high and low water mark.⁸ Nor is it a trespass to appropriate private property to public use, under the right of eminent domain, where compensation is made or secured.⁹ And when a landowner, having the right to immediate possession, enters upon his land quietly and peaceably, or without force and violence, he is not liable in trespass to an occupant.¹⁰ But if he enters in a violent and tumultuous manner, such as would be likely to cause a breach of the peace, the fact that it did not so result does not make the entry peaceable and lawful.¹¹ So, if one having the right to enter upon the land of another for one purpose

forcibly enters for another and different purpose, it is a trespass.¹²

1 Yeates v. Allen, 2 Dana, 134; Walton v. File, 1 Dev. & B. 567.

2 Lambert v. Robinson, 162 Mass. 34, 44 Am. St. Rep. 326; Low v. Elwell, 121 Mass. 309, 23 Am. Rep. 272.

3 Davison v. Wilson, 11 Q. B. 890; Beers v. St. John, 16 Conn. 322; and see Bolling v. Whittle, 37 Ala. 35; Kendall v. Green, 67 N. H. 557.

4 Surocco v. Geary, 3 Cal. 69, 58 Am. Dec. 385; and see Field v. Des Moines, 39 Iowa, 578, 18 Am. Rep. 49; McDonald v. Red Wing, 13 Minn. 41.

5 National Copper Co. v. Mining Co., 57 Mich. 83, 58 Am. Rep. 333.

6 Campbell v. Race, 7 Cush. 408, 54 Am. Dec. 728; and see Holmes v. Seely, 19 Wend. 507.

7 Proctor v. Adams, 113 Mass. 376, 18 Am. Rep. 500.

8 Allen v. Allen, 19 R. I. 114, 61 Am. St. Rep. 738.

9 Osborn v. Hart, 24 Wis. 89, 1 Am. Rep. 161; Commonwealth v. Railroad Co., 58 Pa. St. 26; Crear v. Crossly, 40 Ill. 175.

10 Fort Dearborn Lodge v. Klein, 115 Ill. 177, 56 Am. Rep. 133; Vial v. Hofen, 106 Mich. 160; Burke v. Douglass, 115 Mich. 197.

11 Wahl v. Laubersheimer, 174 Ill. 338.

12 Norton v. Craig, 68 Me. 275.

§ 436. Who Deemed Trespassers—Instances.

If a person is forbidden to enter the business office of another, he is a trespasser if he persists in entering.¹ If one enters a dwelling-house by permission, but remains after request to depart, he is a trespasser *ab initio*.² So, generally, an abuse of legal authority or license, by one who at first acted with propriety under it, makes him

a trespasser *ab initio*.³ If one wrongfully cuts timber on the lands of another, and sells it to an innocent purchaser, an entry upon the lands and removal of the timber by the latter make him a trespasser.⁴ If one enters upon a public highway, and, without a grant from the proper authorities, or permission of the owner of the fee, constructs upon and along such highway a pipe line for carrying natural gas, such person is a trespasser.⁵ So one who, holding a deed absolute upon its face, but which is only a mortgage on land, enters upon the land and takes timber therefrom, over the protest of the owner of the land, pending a suit therefor, is a trespasser.⁶ No person has a right to enter upon the premises of another to induce his employes to leave their employment to the injury of the employer, for the purpose of getting higher wages, or shorter hours of labor for the same pay, or for any other purpose, and if he does so enter, he is a trespasser.⁷ The owner of a park which wholly incloses the land of another person becomes a trespasser by placing wild animals in the park, and allowing them to roam over the land which he does not own.⁸ It is the settled law in Michigan that the fee to land under the waters of the rivers of the state, as far as the middle thread, is in the riparian owners;⁹ and that the owner of the fee of land, whether it be upland or covered with water, has the exclusive right of hunt-

ing and sporting upon his own land.¹⁰ It is accordingly held that one who anchors his boat in waters outside of the navigable portions of a stream, and throws out decoys and engages in duck hunting from such boat, is a trespasser with respect to the riparian owner.¹¹ A child is responsible for its own torts, and is no less a trespasser because the trespass was committed under the control or coercion of a parent or guardian.¹² Where a party may, without a breach of the peace, reclaim his own property, he is not to be deemed a trespasser.¹³ One whose cattle escape upon the land of another may follow and drive them back, without being a trespasser, unless the escape itself was a trespass.¹⁴ So the owner of personal property which has been wrongfully taken from him commits no trespass by entering upon the realty of the wrongdoer, and retaking his property, unless he commits a breach of the peace, or uses unnecessary force.¹⁵ In some cases a right or license to enter upon land results, or may be inferred, from the contracts of the parties in relation to personalty. Permission to keep, or the right to have one's personalty upon the land of another, involves the right to enter for its removal.¹⁶ A sale of chattels, which are at the time upon the land of the seller, will authorize an entry upon the land to remove them, if, by the express or implied terms of the sale, that is the place where the purchaser is to take

them.¹⁷ Where a tenant holds over after the expiration of his term, the landlord has the option to treat him as a trespasser, or as a tenant for another term, subject to the conditions and covenants of the prior lease.¹⁸ One who enters the land of another against his will, for the purpose of fox hunting, is a trespasser.¹⁹ And so of one who thus enters for the purpose of fishing in a brook.²⁰

1 Woodman v. Howell, 45 Ill. 367, 92 Am. Dec. 221; Bogert v. Haight, 20 Barb. 251; Breitenbach v. Trowbridge, 64 Mich. 393, 8 Am. St. Rep. 829; and so, to same effect, Anderson v. Railway Co., 19 Wash. 340.

2 Adams v. Freeman, 12 Johns. 408, 7 Am. Dec. 327. Contra, Wendell v. Johnson, 8 N. H. 220, 29 Am. Dec. 648.

3 Dickson v. Parker, 3 How. (Miss.) 219, 34 Am. Dec. 78; and see Jewell v. Mahood, 44 N. H. 474, 84 Am. Dec. 90.

4 Hazelton v. Week, 49 Wis. 661, 35 Am. Rep. 796.

5 Huffman v. State, 21 Ind. App. 449, 69 Am. St. Rep. 368; and see Harrison v. Rutland (1893), 1 Q. B. 142.

6 Long Mfg. Co. v. Gray, 13 Tex. Civ. App. 172.

7 Webber v. Barry, 66 Mich. 127, 11 Am. St. Rep. 466, and note 474. See, also, Gore v. Condon, 87 Md. 368, 67 Am. St. Rep. 352.

8 Ellis v. Blue Mountain Forest Assn., 69 N. H. 385; 41 Atl. Rep. 856; 42 L. R. Ann. 570.

9 Grand Rapids v. Powers, 89 Mich. 94, 28 Am. St. Rep. 276. See sec. 302a, ante.

10 Sterling v. Jackson, 69 Mich. 497, 13 Am. St. Rep. 405.

11 Hall v. Alford, 114 Mich. 165.

12 O'Leary v. Elevator Co., 7 N. Dak. 554.

13 Vial v. Hafen, 106 Mich. 160; Burke v. Douglass, 115 Mich. 197. See sec. 435, ante.

14 McLeod v. Jones, 105 Mass. 405, 7 Am. Rep. 539.

15 Patrick v. Colerick, 3 Mees. & W. 483; Blades v. Higgs, 10 Com. B., N. S., 713; Webb v. Beavan, 6 Man. & G. 1055; Madden v. Brown, 75 N. Y. St. Rep. 118.

16 Doty v. Gorham, 5 Pick. 487, 16 Am. Dec. 417; White v. Elwell, 48 Me. 360, 77 Am. Dec. 231.

17 Drake v. Wells, 11 Allen, 141; Giles v. Simonds, 15 Gray, 441, 77 Am. Dec. 373; Nettleton v. Sikes, 8 Met. 34; McLeod v. Jones, 105 Mass. 403, 7 Am. Rep. 539; Wood v. Manley, 11 Ad. & E. 34.

18 Smith v. Allt, 4 Abb. N. C. 205; 7 Daly, 492; Schuyler v. Smith, 51 N. Y. 309, 10 Am. Rep. 609; Ives v. Williams, 50 Mich. 100; Tolle v. Orth, 75 Ind. 298, 39 Am. Rep. 147; Wolffe v. Wolff, 69 Ala. 549, 44 Am. Rep. 526; Robinson v. Holt, 90 Ala. 115. Question whether one is a trespasser who passes over land in a balloon: See Kenyon v. Hart, 6 Best & S. 249.

19 Paul v. Summerhayes, L. R. 4 Q. B. Div. 9.

20 Beach v. Morgan, 67 N. H. 529, 68 Am. St. Rep. 692.

§ 437. Nature of Remedy by Action for Trespass to Land.

At common law, the action for injuries to realty consequent upon entry thereon without right is in form trespass quare clausum fregit. The gist or basis of the action is the injury to the possession, either actual or constructive, and it will lie for any unauthorized entry.¹ The action is maintainable, although the owner is not substantially injured. The law implies damage to the owner, and, in the absence of proof as to the extent of the injury, he is at least entitled to nominal damages.² An action in this form is proper for the recovery of mesne profits.³ And it is held that an action of trespass furnishes an

adequate remedy for mining and taking away coal, without right, from the lands of another.⁴ And if a party puts a fence on or plows the land of another, without the latter's permission, he is liable in an action of trespass.⁵ And it is held that the action will lie for disturbance of a fishery;⁶ for removing or defacing a tombstone;⁷ or for erecting and fastening a board so as to overhang the plaintiff's close.⁸ Several actions cannot be maintained for a single and completed trespass upon and injury to an entire tract of land.⁹ But where one wrongfully enters upon another's land, and pastures his cattle thereon, the trespass is held to be a continuing one for which successive actions can be maintained.¹⁰

1 Dean v. Comstock, 32 Ill. 173; McWilliams v. Morgan, 75 Ill. 473; Frisbee v. Marshall, 122 N. C. 760; Western Book etc. Co. v. Jevne, 78 Ill. App. 668; Hatch v. Donnell, 74 Me. 163; Rowe v. Bradley, 12 Cal. 226.

2 Pfeiffer v. Grossman, 15 Ill. 53; and see sec. 433, ante.

3 Scheffel v. Weiler, 41 Ill. App. 85; Western Book etc. Co. v. Jevne, 78 Ill. App. 668; Young v. Downey, 145 Mo. 261.

4 Rice v. Looney, 81 Ill. App. 537; and see Rico-Aspen etc. Min. Co. v. Enterprise Min. Co., 56 Fed. Rep. 131; Eardley v. Granville, 3 Ch. Div. 826.

5 Pfeiffer v. Grossman, 15 Ill. 53.

6 Young v. Hichens, 6 Q. B. 606; Sporting Club v. Vosburg, 1 Wilcox (Pa.), 285; and see Russell v. Stocking, 8 Conn. 236.

7 Spencer v. Brewster, 3 Bing. 136; 10 Moore, 494.

8 Pickering v. Rudd, 1 Stark. 56; 4 Camp. 219.

9 Pierro v. Railroad Co., 39 Minn. 451, 12 Am. St. Rep. 673.

10 *Creswell Ranch etc. Co. v. Scoggins*, 15 Tex. Civ. App. 373.

§ 438. Venue of Action.

It has been held that an action for injuries to real property is on principle just as transitory in its nature as one on contract, or for a tort committed on the person or personal property, and may, therefore, be maintained in one state for injury to land lying in another state.¹ But this ruling is in conflict with the great weight of judicial authority, sustaining the doctrine that an action of trespass *quare clausum fregit* cannot be maintained in one state in reference to lands situated in another. Such action, it is held, has always been treated as a local action.² The action can be brought alone in the county where the lands are situated;³ and it must appear on the record that the trespass was committed in the county.⁴ But where trespass upon land is followed by the asportation of timber severed from the land, if the plaintiff waives the original trespass, and sues simply for the conversion of the property so carried away, the action would become transitory.⁵ It has also been held that an action for injuries to real estate is transitory where the gravamen of the action is negligence, as, for instance, negligently setting fire to the plaintiff's premises.⁶

1 *Little v. Railway Co.*, 65 Minn. 48, 60 Am. St. Rep. 421, and see *Genin v. Grier*, 10 Ohio, 209; *John-*

son v. Gravel Co., 30 C. C. A. 35; 86 Fed. Rep. 269; Polley v. Wilkisson, 5 N. Y. Civ. Proc. Rep. 135.

2 Niles v. Howe, 57 Vt. 388; Allin v. Connecticut etc. Co., 150 Mass. 560; Eachus v. Trustees etc., 17 Ill. 534; Du Breuil v. Pennsylvania Co., 130 Ind. 137; Sentems v. Ladew, 140 N. Y. 463, 37 Am. St. Rep. 569; Dodge v. Colby, 108 N. Y. 445; Sprague Nat. Bank v. Railway Co., 57 N. Y. Supp. 844, 40 App. Div. 69; Morris v. Railway Co., 78 Tex. 17, 22 Am. St. Rep. 17, and note.

3 Du Breuil v. Pennsylvania Co., 130 Ind. 137; Indiana etc. Ry. Co. v. Foster, 107 Ind. 430; Jacobson v. Lynn, 54 Neb. 794.

4 Champion v. Doughty, 18 N. J. L. 3, 35 Am. Dec. 523.

5 American Union Tel. Co. v. Middleton, 80 N. Y. 408; Whidden v. Seelye, 40 Me. 247, 63 Am. Dec. 661.

6 Home Ins. Co. v. Railroad Co., 11 Hun, 182; Barney v. Burstenbinder, 7 Lans. 210.

§ 439. Who may Sue—Possession of Plaintiff.

Formerly, in order to maintain the action of trespass quare clausum fregit, actual possession was necessary.¹ But it is now settled that a constructive possession is sufficient.² Without possession, however, either actual or constructive, trespass cannot be maintained.³ In Kentucky, mere claim of ownership, with frequent cutting and removing of timber, held insufficient.⁴ Constructive possession, sufficient to sustain trespass quare clausum, is only that of the owner, when no person is in the actual possession.⁵ If there is anyone in actual possession, he alone can maintain the action.⁶ One in possession under a claim of ownership, upon proof of such possession, may maintain the action for a trespass upon the prop-

erty while such possession existed.⁷ A settler who has entered public lands of the United States, under the provisions of the homestead law, has such title as will support an action by him for trespass committed after entry and before his right to a patent becomes absolute.⁸ One in exclusive possession of land under a lease is, during the continuance of his tenancy, to all intents and purposes the owner, and may maintain trespass against a wrongdoer, which cannot be defeated by showing the title to be in some other one than the plaintiff.⁹ A tenant being in exclusive possession, the landlord out of possession cannot maintain trespass. The tenant must bring the action.¹⁰ But it is held that the destruction of the freehold, as by the washing away of land, is an injury for which no one but the owner of the inheritance can recover.¹¹ An injury by a stranger, to an exclusive possession in lands, of a mere licensee, is actionable.¹² Thus, one having a parol license to maintain a sewer from his land across that of an adjoining owner may have an action against a stranger who injures or destroys the sewer.¹³ One in possession of crown lands, under a parol license from the crown, may maintain trespass against a wrongdoer.¹⁴ So, peaceable possession of premises, although without right, is sufficient title to maintain trespass against a wrongdoer, who, without a better right, intrudes upon such possession.¹⁵ One of several

tenants in common may maintain an action of trespass quare clausum against his cotenant where there has been an actual ouster.¹⁶ And it is held that a cotenant of a pasture may, without making his cotenants parties, maintain trespass against the owner of an animal which breaks into the pasture and injures an animal belonging to such cotenant, and rightfully within the pasture.¹⁷ A vendee in possession of land under a contract to purchase, and who is entitled to a deed, has sufficient title to recover in an action for hay and pasturage lost through the negligent flooding of the land by booming operations.¹⁸ A tenant in dower may maintain trespass against a stranger for an injury to the reversion.¹⁹ So an executor can maintain trespass for injury to a chattel real of his ancestor done in the testator's lifetime.²⁰ And after entry by an heir at law, an action may be maintained by him against a wrongdoer for a trespass committed at a time antecedent to the entry.²¹ Where a tort upon realty affects both the estate of a tenant and that of a reversioner or remainderman, each may sue separately, and, the damages being apportionable, each recovers damages to cover the injury done to his estate.²² In trespass upon land, conveyed in trust, the trustees may sue, but, if the cestui que trust be in actual possession, he should be the plaintiff.²³ A corporation may maintain trespass for an invasion of its rights in real estate.²⁴

Where lands are conveyed to husband and wife in fee, the husband may maintain, in his own name, an action of trespass quare clausum for cutting and carrying away timber.²⁵ In West Virginia, husband and wife may join in an action at law, or suit in equity, for an injury to her separate estate, or she may sue alone.²⁶ An owner of lands occupied by tenants has such possession of the highway in front of the lands as will enable him to maintain trespass against a telegraph company for erecting poles therein without his consent.²⁷

1 *Truss v. Old*, 6 Rand. 556, 18 Am. Dec. 748; *Railroad Co. v. Esterle*, 13 Bush, 667, 672; *Kretzer v. Wyssong*, 5 Gratt. 9.

2 *Storrs v. Feick*, 24 W. Va. 606; *Russell v. Meyer*, 7 N. Dak. 335; *Clay v. St. Albans*, 43 W. Va. 539, 64 Am. St. Rep. 883; *Wilson v. Manufacturing Co.*, 40 W. Va. 413, 52 Am. St. Rep. 890; *McFeters v. Pierson*, 15 Colo. 201, 22 Am. St. Rep. 388.

3 *Fogg v. Cushing*, 40 Me. 315; *Gould v. Sternburg*, 4 Ill. App. 439; *Moon v. Avery*, 42 Minn. 405; *Arneson v. Spawn*, 2 S. Dak. 269, 39 Am. St. Rep. 783; *Randall v. Sanders*, 87 N. Y. 578; *Taylor v. State*, 65 Ark. 595; *Newcomb v. Love*, 112 Mich. 115; *Blackford v. Rogers* (Va. Sup. Ct. App., 1896), 23 S. E. Rep. 896.

4 *Ohio etc. R. R. Co. v. Wooten* (Ky. Ct. App. 1898), 46 S. W. Rep. 681.

5 *Edwards v. Noyes*, 65 N. Y. 125; *Wickham v. Freeman*, 12 Johns. 183; *Smucker v. Railroad Co.*, 6 Pa. Sup. Ct. 521.

6 *Gunsolus v. Lormer*, 54 Wis. 630; *Oakman v. Fowler*, 43 Vt. 462.

7 *McDonough v. Carter*, 98 Ga. 703; *Keith v. Tilford*, 12 Neb. 271.

8 *Culbertson v. Olander*, 51 Neb. 539.

9 *McCrillis v. State*, 69 Ind. 159; *Kennedy v. State*, 81 Ind. 379; *State v. Burns*, 123 Ind. 427.

10 *Lindenbower v. Bentley*, 86 Mo. 515; *Gould v. Sternberg*, 4 Ill. App. 439; *Frisbee v. Marshall*, 122 N. C. 760.

11 *Anderson v. Boom Co.*, 57 Mich. 216; and see *George v. Fisk*, 32 N. H. 32; *Russell v. Meyer*, 7 N. Dak. 335.

12 *Paul v. Hazleton*, 37 N. J. L. 106.

13 *Miller v. Inhabitants etc.*, 62 N. J. L. 771; 42 Atl. Rep. 735.

14 *Harper v. Charlesworth*, 4 Barn. & C. 574; 6 Dowl. & R. 572.

15 *Oklahoma City v. Hill*, 6 Okla. 114.

16 *Murray v. Hall*, 7 Com. B. 441; *Wilkinson v. Haggarth*, 12 Q. B. 837.

17 *Morgan v. Hudwell*, 52 Ohio St. 552, 49 Am. St. Rep. 741.

18 *Witheral v. Booming Co.*, 68 Mich. 48, 13 Am. St. Rep. 325; and see *Field v. Log Driving Co.*, 67 Wis. 569.

19 *Willey v. Laraway*, 64 Vt. 559.

20 *Hone v. Hamilton*, 1 R. 9 Com. L. 15; and see *Dascomb v. Davis*, 5 Met. 335; *Haight v. Green*, 19 Cal. 113; Cal. Code Civ. Proc., sec. 1684.

21 *Barnett v. Guildford*, 11 Ex. 19.

22 *Jordan v. Benwood*, 42 W. Va. 312, 57 Am. St. Rep. 859; *Yeager v. Fairmont*, 43 W. Va. 259.

23 *Rogers v. White*, 1 Sneed, 68; *Cox v. Walker*, 26 Me. 504; *Clay v. St. Albans*, 43 W. Va. 539, 64 Am. St. Rep. 883.

24 *Clay v. St. Albans*, 43 W. Va. 539, 64 Am. St. Rep. 883; *Castleton v. Langdon*, 19 Vt. 210; *Railroad Co. v. Partlow*, 14 Rich. 237.

25 *Fairchild v. Chastelleux*, 1 Pa. St. 176, 44 Am. Dec. 117. See *Alexander v. Hard*, 42 How. Pr. 384; 64 N. Y. 228; *Spencer v. Railroad Co.*, 22 Minn. 29; *Adams v. Barry*, 10 Gray, 361.

26 *Fox v. Insurance Co.*, 31 W. Va. 374; *Clay v. St. Albans*, 43 W. Va. 539, 64 Am. St. Rep. 883. See *Noyes v. Hemphill*, 58 N. H. 537; *Lyon v. Railway Co.*, 42 Wis. 548.

27 *American Tel. Co. v. Jones*, 78 Ill. App. 372; and see *Postal etc. Co. v. Eaton*, 170 Ill. 513, 62 Am. St. Rep. 390.

§ 440. What Plaintiff Must Show—Evidence.

An action for trespass to real property cannot be maintained when the defendant is in possession of the property.¹ It cannot be maintained by the true owner, out of possession, against one in open, notorious, exclusive, adverse and hostile possession claiming under color of title in good faith.² The general rule is, that in order to maintain an action of *quare clausum fregit*, the plaintiff must establish his actual, exclusive possession of the locus in quo, or a constructive possession by proof of his title and the absence of actual, exclusive possession by another.³ The burden is on him to show that at the time of the alleged trespass he was either the owner of the land trespassed upon, or else in the actual possession thereof.⁴ The action is not maintainable by one who comes into possession after the commission of the trespass.⁵ The possession involved in the fact of ownership is sufficient to sustain an action in the nature of trespass *quare clausum*, if, at the time of the injuries complained of, the land was not in the actual, exclusive occupation of another.⁶ And, in such action, parol proof of the plaintiff's undisputed possession is sufficient to show title in himself, when no better title is alleged to be in the defendant or some

other person.⁷ A party need not have his land inclosed with a fence before he can be said to be in actual possession. Any class of improvements or acts of dominion indicating to neighboring residents the person who has the exclusive control of the land will constitute possession to the extent of the paper title under which such party entered, so as to enable him to maintain trespass for any injury to the estate.⁸

1 Kinney v. Ferguson, 101 Mich. 178; Newcomb v. Love, 112 Mich. 115; Wilsons v. Bibb, 1 Dana, 7, 25 Am. Dec. 118.

2 Johnson v. Gravel Co., 86 Fed. Rep. 269; 30 C. C. A. 35; and see Transit Co. v. Weston, 121 Pa. St. 485; Lehigh etc. Iron Co. v. New Jersey etc. Iron Co., 55 N. J. L. 350.

3 Fitch v. Railroad Co., 59 Conn. 414; Waterbury Clock Co. v. Irion, 71 Conn. 254; American Tel. Co. v. Jones, 78 Ill. App. 372.

4 Ebersol v. Trainor, 81 Ill. App. 645; Chicago etc. R. R. Co. v. Loeb, 118 Ill. 203, 59 Am. Rep. 341; Yellow River etc. R. R. Co. v. Harris, 35 Fla. 385; and see Gathings v. Miller, 76 Miss. 651; 24 So. Rep. 964.

5 Yellow River etc. R. R. Co. v. Harris, 35 Fla. 385; Pilgrim v. Railway Co., 8 Com. B. 25. But compare Barnett v. Guildford, 11 Ex. 19.

6 Merwin v. Morris, 71 Conn. 555; Church v. Meeker, 34 Conn. 421; Van Rensselaer v. Radcliff, 10 Wend. 639, 25 Am. Dec. 582.

7 McNarra v. Railway Co., 41 Wis. 69; Spurlock v. Railway Co., 13 Wash. 29.

8 McLean v. Farden, 61 Ill. 106; Eddy v. Gage, 147 Ill. 162; Wahl v. Laubersheimer, 174 Ill. 338; Chandler v. Walker, 21 N. H. 282, 53 Am. Dec. 202.

§ 441. Who Liable in Trespass.

In trespass there are no accessories. 'All are principals who are in anywise concerned in the trespass.¹ One who commands or sanctions a trespass is equally guilty with the one who does the act, and both are liable therefor, jointly or severally.² All trespassers are equally liable and are treated alike, whether acting for themselves or as agents or attorneys for others.³ A master is liable for a trespass committed by his servant, bona fide as such, and in the line of his employment.⁴ But a trespass committed by a servant merely to prevent an annoyance to himself is not an act for which the master is liable.⁵ And a person who employs another innocently, and for a lawful purpose, is not usually liable for his trespasses.⁶ All who participate in the wrongful act of pulling down and removing a house from mortgaged land are trespassers, and are equally liable as such.⁷ Trespass will lie for damage committed by cattle agisted, either against the owner or agister, but one satisfaction only can be obtained.⁸ Tenants in possession may be sued jointly for trespass committed by animals kept by them in common upon the premises, although the several animals are owned by them separately and individually.⁹ If it be agreed between landlord and tenant that the crops shall belong to the landlord, and the tenant sells them, all engaged in the transaction are liable to the landlord in

trespass.¹⁰ On the other hand, where land is leased for a share of the crop, to be delivered to the lessor, he is liable to the lessee in trespass if he enters without permission upon the demised premises and takes his share of the crop therefrom.¹¹ So, if a landlord, after a case of forfeiture of the lease by the tenant, receives rent, and subsequently interferes with the tenant's possession, he is liable in trespass.¹² It has been held that trespass quare clausum cannot be sustained against a corporation aggregate.¹³ But it is well settled that if a corporation, under the right of eminent domain, enters upon the lands of an individual, without making compensation or tendering security, the entry is unlawful, and the corporation may be held liable to the owner in an action of trespass.¹⁴ And it is held that an action is maintainable against a municipal corporation for a trespass committed by any of its officers or agents acting under its authority, or in pursuance of directions given them, upon the property or estate of another party.¹⁵ But an officer of a corporation, who has nothing to do with its acts of trespass, is not personally liable therefor, where he did nothing to make the acts of the corporation his own.¹⁶ An action in the nature of quare clausum fregit lies for disinter-ring a dead body, and may be brought by the grantee of a cemetery lot against the superintendent of the cemetery, for disinterring and re-

moving therefrom the remains of the plaintiff's child.¹⁷

1 Whitney v. Turner, 1 Scam. 253.

2 Northern Trust Co. v. Palmer, 171 Ill. 383; State v. Smith, 78 Me. 260, 57 Am. Rep. 802; McCloskey v. Powell, 123 Pa. St. 62, 10 Am. St. Rep. 512; and see Houston v. Nord, 39 Minn. 490.

3 Marshall v. Eggleston, 82 Ill. App. 52; Walters v. Hamilton, 75 Mo. App. 237; Meade v. Railway Co., 68 Mo. App. 92.

4 Arasmith v. Temple, 11 Ill. App. 39; Hartman v. Muehlbach, 64 Mo. App. 565.

5 Mogk v. Railway Co., 80 Ill. App. 411.

6 Sutherland v. Ingalls, 63 Mich. 620, 6 Am. St. Rep. 332; and see Michels v. Stork, 44 Mich. 2.

7 Stevens v. Smathers, 124 N. C. 571; and see Hapgood v. Blood, 11 Gray, 400; Jones v. Costigan, 12 Wis. 677, 78 Am. Dec. 771.

8 Sheridan v. Bean, 8 Met. 284, 41 Am. Dec. 507.

9 Jack v. Hudnall, 25 Ohio St. 255, 18 Am. Rep. 298.

10 Gray v. Stevens, 28 Vt. 1, 65 Am. Dec. 216; Lewis v. Lyman, 22 Pick. 437.

11 Blake v. Coats, 3 G. Greene, 548; Hatchett v. Kimbrough, 4 Jones, 163; Symonds v. Hall, 37 Me. 354, 59 Am. Dec. 53.

12 Jolly v. Single, 16 Wis. 280.

13 Foote v. Cincinnati, 9 Ohio, 31, 34 Am. Dec. 420.

14 Bethlehem etc. Water Co. v. Yoder, 112 Pa. St. 136; and see sec. 434, ante.

15 Hildreth v. Lowell, 11 Gray, 345; Allen v. Decatur, 23 Ill. 332, 76 Am. Dec. 692; Robbins v. Willmar, 71 Minn. 403; Dater v. Railroad Co., 2 Hill, 629; Frederick v. Lansdale Borough, 156 Pa. St. 613; Mound v. Canal Co., 4 Man. & G. 452.

16 Davenport v. Newton, 71 Vt. 11; see Nunnally v. Iron Co., 94 Tenn. 397; Fanning v. Osborne, 102 N. Y. 441.

17 Meagher v. Driscoll, 99 Mass. 281, 96 Am. Dec. 759; Bessemer etc. Imp. Co. v. Jenkins, 111 Ala. 135, 56 Am. St. Rep. 26.

§ 442. Pleading—Declaration or Complaint.

A declaration in trespass should aver the county in which the trespass was committed.¹ In an action for an injury to a present estate in real property, the declaration must show title, but an allegation of possession by the plaintiff is a sufficient pleading of title.² Averment of possession in trespass quare clausum is sufficiently contained in the charge that "defendant broke and entered into the close of plaintiff."³ A declaration in trespass for obstructing the flow of water and overflowing the plaintiff's land to his injury is held to be defective if it fails to aver that the defendant was notified or requested to remove the obstruction.⁴ In trespass for cutting timber on a mining claim, the plaintiff need not allege his citizenship in the first instance, but may rely upon an allegation of possession or title as against the wrongdoer without title or right of possession.⁵ If the trespass alleged is such as would constitute a permanent and necessary injury to the market value of the plaintiff's fee in the land trespassed on, the declaration is not rendered demurrable because of its failure to allege that the plaintiff was in possession at the time of the trespass.⁶ The actual damage done to the property trespassed on must be averred with certainty in the complaint, otherwise a demurrer thereto for uncertainty on that ground should be sustained.⁷ A petition which alleged that the plaintiff was

the owner by lease of certain lands, and that the defendant, with force and arms, entered and took possession thereof, and excluded the plaintiff therefrom, and praying for the reasonable value of the land for the time appropriated, was held to state a good cause of action.⁸ So a petition in trespass, setting forth in substance that at the time of the alleged trespass the plaintiffs were in exclusive and peaceable possession of the premises, that they were mining under and in compliance with the terms of a valid lease from the former owners, which had not expired, that the defendant unlawfully and against the plaintiff's will ousted them from possession, and thereby deprived them of the beneficial use of the property for the remainder of the term, sufficiently states a cause of action.⁹ In an action against a railway company for trespass to a mining claim, a complaint which shows an entry without permission on a mining claim in the plaintiff's possession, and the doing an injury to the soil and timber, sufficiently avers possession, entry, and damage.¹⁰ In an action by a reversioner for an injury to the reversion or fee through a trespass, the plaintiff must allege and prove that the injury is of that character, and not merely an injury to the possessory rights of the tenant.¹¹

1 *Champion v. Doughty*, 18 N. J. L. 3, 35 Am. Dec. 523; and see sec. 438, ante.

2 *Clay v. St. Albans*, 43 W. Va. 539, 64 Am. St. Rep. 883.

3 *Finch v. Alston*, 2 Stew. & P. 83, 23 Am. Dec. 299.

4 *Groff v. Ankenbrandt*, 124 Ill. 51, 7 Am. St. Rep. 342; and see *Grisby v. Water Co.*, 40 Cal. 396; *Johnson v. Lewis*, 13 Conn. 303, 33 Am. Dec. 405; *Nichols v. Boston*, 98 Mass. 39, 93 Am. Dec. 132; *West v. Railroad Co.*, 8 Bush, 404; *Slight v. Gutzloff*, 35 Wis. 677, 17 Am. Rep. 477; *Railroad Co. v. Smith*, 64 Fed. Rep. 682.

5 *McFeters v. Pierson*, 15 Colo. 201, 22 Am. St. Rep. 388. See *Moritz v. Lavelle*, 77 Cal. 10, 11 Am. St. Rep. 229; *Anthony v. Jillson*, 83 Cal. 297; *Keeler v. Trueman*, 15 Colo. 143.

6 *Jacksonville etc. Ry Co. v. Griffin*, 33 Fla. 602.

7 *Lamb v. Harbaugh*, 105 Cal. 680. As to sufficiency of allegation of damage, see *Razzo v. Varni*, 81 Cal. 289; *Mallory v. Thomas*, 98 Cal. 644.

8 *Creswell etc. Cattle Co. v. Scoggins*, 15 Tex. Civ. App. 373.

9 *Robertson v. Land Co.*, 70 Mo. App. 262.

10 *Jackson v. Dines*, 13 Colo. 90.

11 *Geer v. Fleming*, 110 Mass. 39; *Bobb v. Granite Co.*, 41 Mo. App. 642.

§ 443. Same—Description of Premises.

In an action of trespass *quare clausum fregit*, the description of the close alleged to have been broken, though not particularly definite, is sufficient, if the defendant is not misled, or made uncertain as to the particular locus in quo.¹ The description of the premises as a mining claim of certain dimensions, with a reference to the location certificate and the patent for metes and bounds, is held sufficient.²

1 *Bessemer etc. Imp. Co. v. Jenkins*, 111 Ala. 135, 56 Am. St. Rep. 26. See *Meixsell v. Feezor*, 43 Ill. App. 180.

2 *Rico-Aspen etc. Min. Co. v. Enterprise Min. Co.*, 56 Fed. Rep. 131.

§ 444. Defenses to Action of Trespass.

It is a good defense to an action of trespass that the defendant entered and occupied the land with the consent of the owner, both parties at the time, by mutual mistake, supposing that the defendant had the right of entry.¹ It is held to be a good defense in trespass that the defendant acted under duress.² In an action of trespass *quare clausum* against a person for passing his own boundaries and entering the land of another, he cannot defend by showing his ignorance of the boundary lines, and whether he or his servant acting within the scope of his employment committed the trespass is immaterial.³ So a trespasser without title cannot set up, as a defense, an outstanding title in a third person.⁴ A former recovery for use and occupation, in an action for the possession of land, is a bar to a subsequent action for injuries to the estate during the same period of occupation.⁵ And the bar to a recovery in trespass includes all the consequences resulting from such trespass.⁶ At common law, the owners of cattle are required to fence them in, or be answerable in damages for their trespasses;⁷ and the owner of cattle who is sued for damages for their trespasses must show, to prevent recovery, that he kept his cattle in, or tried to, by the maintenance of a sufficient fence.⁸ In trespass for breaking and entering a dwelling-house, and carrying away goods, it is no defense to prove

that the plaintiff kept a bawdy-house.⁹ To justify breaking and entering a house without warrant, on suspicion of felony, defendant must show that he had reason to believe that the person suspected was there, and that he entered for the purpose of arresting him.¹⁰ It is said that everyone must be sure of his legal right when he invades the possession of another, and trespasses are not excused by good faith, though they may be aggravated by bad faith.¹¹

1 Shaw v. Mussey, 48 Me. 247.

2 Cunningham v. Pitzer, 2 W. Va. 264, 94 Am. Dec. 526.

3 Mining Co. v. Mining Co., 11 Colo. 223, 7 Am. St. Rep. 226. See Williams v. Coal Co., 37 Ohio St. 583.

4 Jackson v. Harder, 4 Johns. 203, 4 Am. Dec. 262; Anderson v. Gray, 134 Ill. 550, 23 Am. St. Rep. 696; Thomas v. Hunsucker, 108 N. C. 720; Refining Co. v. Tabor, 13 Colo. 41, 16 Am. St. Rep. 185. See Bird v. Lisbos, 9 Cal. 1, 70 Am. Dec. 617.

5 Pierro v. Railway Co., 39 Minn. 451, 12 Am. St. Rep. 673.

6 Williams v. Coal Co., 37 Ohio St. 583.

7 See sec. 431, ante.

8 Barber v. Mensch, 157 Pa. St. 390.

9 Love v. Moynehan, 16 Ill. 277, 63 Am. Dec. 306; and see Perkins v. Towle, 43 N. H. 220, 80 Am. Dec. 149.

10 Smith v. Shirley, 3 Com. B. 142.

11 Cubit v. O'Dett, 51 Mich. 347.

§ 445. Pleading—Plea or Answer.

The general issue in trespass *quare clausum fregit* puts in issue, not only the fact of the trespass, but also the title or right of the plaintiff.

And any title, whether freehold or possessory in the defendant, or another, is admissible in evidence under such plea.¹ But a justification, such as leave and license, or a private right of way, must be specially pleaded.² If a miner enters upon land in the possession of another, claiming the right to enter for mining purposes, he must justify his entry by showing: 1. That the land is public land; 2. That it contains mines or minerals; 3. That he enters for the bona fide purpose of mining. And such justification must be affirmatively pleaded in the answer, with all requisite averments, to show a right under the statute or by law to enter.³ The plea of *liberum tenementum* in trespass *quare clausum* asserts a freehold in the defendant and a right to immediate possession, but admits possession in plaintiff and a color of right thereto.⁴ Such plea to a declaration in trespass, charging the defendant with forcibly expelling the plaintiff and servants from lands of which they were in peaceable occupation, is held bad.⁵ At common law, the plea of not guilty in an action of trespass *quare clausum* admits the plaintiff's title and right of possession.⁶ Where the complaint avers matter of aggravation after entry, an answer justifying the aggravating matter, but admitting the plaintiff's title and possession, does not state facts sufficient to constitute a defense.⁷ If the defendant justifies the alleged trespass under the act in relation to laying

out and establishing roads, his answer must show a strict compliance with all the provisions of the statute.⁸ And the general rule is, that the facts constituting justification must be fully set up.⁹ But it is held that the defendant need not set forth in his answer the lease under which he justifies in an action for breaking and entering a close.¹⁰ If the evidence shows that the defendant entered upon land and cut and removed hay therefrom under an agreement with the plaintiff that he might do so, a verdict against the defendant for trespass should be set aside.¹¹

1 Floyd v. Ricks, 14 Ark. 286, 58 Am. Dec. 374; and see, also, Todd v. Jackson, 26 N. J. L. 525; United States Pipe-Line Co. v. Delaware etc. R. R. Co., 62 N. J. L. 254; Saunders v. Wilson, 15 Wend. 338.

2 Hetfield v. Railroad Co., 29 N. J. L. 571; Lockhart v. Geir, 54 Wis. 133; Alford v. Barnum, 45 Cal. 482; Dorris v. Sullivan, 90 Cal. 279. But see Rasor v. Qualls, 4 Blackf. 286, 30 Am. Dec. 658, holding that the general issue in trespass will allow proof of license.

3 Lentz v. Victor, 17 Cal. 271.

4 Hunter v. Hatton, 4 Gill, 115, 45 Am. Dec. 117; and see Wilsons v. Bibb, 1 Dana, 7, 25 Am. Dec. 118; Tribble v. Frame, 7 J. J. Marsh. 599, 23 Am. Dec. 439; Piper v. Connelly, 108 Ill. 646.

5 Sprague Nat. Bank v. Railway Co., 62 N. J. L. 474; Thiel v. Land Co., 58 N. J. L. 212. Plea of liberum tenementum: See Mayhew v. Ford, 61 N. J. L. 532.

6 Nafe v. Hudson (Ct. Civ. App., Tex.), 47 S. W. Rep. 675. But the rule is otherwise in Mississippi: Alliance Trust Co. v. Hardware Co., 74 Miss. 585, 60 Am. St. Rep. 531.

7 Pico v. Colimas, 32 Cal. 578.

8 Sherman v. Buick, 32 Cal. 211, 91 Am. Dec. 577; and see Smithers v. Fitch, 82 Cal. 156; Butte County v. Boydston, 64 Cal. 111.

9 Towdy v. Ellis, 22 Cal. 659; McComb v. Reed, 28 Cal. 281, 87 Am. Dec. 115.

10 Dillon v. Brown, 11 Ga. 179, 71 Am. Dec. 700.

11 Meyers v. Savery, 19 Mont. 329.

§ 446. Same—Subsequent Pleadings.

A traverse of a plea of *liberum tenementum* in trespass *quare clausum* admits the defendant's right to possession if he is entitled to the freehold, and puts in issue only the question of freehold.¹ Hence, evidence of a mere possessory right in the plaintiff is inadmissible, but evidence of a freehold is admissible.²

1 Hunter v. Hatton, 4 Gill, 115, 45 Am. Dec. 117; and see *Brusby Mound v. McClintock*, 146 Ill. 643; *Ragains v. Stout*, 81 Ill. App. 209.

2 Hunter v. Hattin, 4 Gill, 115, 45 Am. Dec. 117. See *Lyon v. Fairbank*, 79 Wis. 455, 24 Am. St. Rep. 732.

§ 447. Evidence—Admissibility and Sufficiency of.

In order to maintain an action of trespass upon realty, for the recovery of damages to the freehold, the plaintiff, if not in possession when the injury was committed, must show himself to be the true owner of the land, and this by proving title in himself, and in such case title is not shown by proof of former possession, without more.¹ Under the general issue in such action, all the acts and circumstances directly connected with and attendant upon the transaction com-

plained of are competent for either party to prove, as tending to favor or rebut the presumption of malice.² Evidence of title, as well as of possession in the plaintiff, is admissible under the general issue;³ but not evidence to show that an act *prima facie* a trespass was authorized by the plaintiff.⁴ Evidence of the commission of a trespass upon land other than that described in the writ is inadmissible.⁵ So, generally, matters not directly connected with the acts of trespass complained of cannot be shown.⁶ In an action for maliciously burning a building, evidence of the defendant's good character is inadmissible under the general denial.⁷ Plaintiff in trespass need not prove his possession rightful, but it devolves upon the defendant to prove it wrongful.⁸ One relying upon a license as a defense to trespass has the burden of proof.⁹ So, generally, if a *prima facie* case of trespass is made out against the defendant, the burden of proving justification is on him, for the court will not presume its existence.¹⁰ So, in trespass by a plaintiff in possession against a defendant out of possession, the burden of proof as to title is on the latter, where both parties claim the title.¹¹ Trespass *quare clausum* cannot be maintained without showing an unlawful entry.¹²

1 *Mining Co. v. Irby*, 40 Ga. 482; *Whiddon v. Lumber Co.*, 98 Ga. 700. See sec. 440, ante.

2 *Perkins v. Towle*, 43 N. H. 220, 80 Am. Dec. 149.

- 3 Hunter v. Hatton, 4 Gill, 115, 45 Am. Dec. 117.
4 Finch v. Alston, 2 Stew. & P. 83, 23 Am. Dec. 299.
5 Longfellow v. Quimby, 29 Me. 196, 48 Am. Dec. 525.
6 Perkins v. Towle, 43 N. H. 220, 80 Am. Dec. 149.
7 Gebhart v. Burkett, 57 Ind. 378, 26 Am. Rep. 61;
Barton v. Thompson, 56 Iowa, 571, 41 Am. Rep. 119.
8 Linard v. Crossland, 10 Tex. 468, 60 Am. Dec. 213.
9 Northern Trust Co. v. Palmer, 171 Ill. 383.
10 Woodbridge v. Conner, 49 Me. 353, 77 Am. Dec. 263.
11 Heath v. Williams, 25 Me. 209, 43 Am. Dec. 265.
12 Harris v. Gillingham, 6 N. H. 9, 23 Am. Dec. 701;
Kimball v. Hilton, 92 Me. 214, 220; and see sec. 440, ante.

§ 448. Judgment in Trespass Determines What.

The fact, and the only fact, necessarily determined by a judgment of guilty in an action of quare clausum is, that the plaintiff was at the time of the alleged trespass in the rightful possession of the particular locus where the acts of trespass were committed.¹ It is not necessarily determined that the plaintiff had title, and this is so, although the defendant pleads soil and freehold, because the defendant may have had the title, and at the same time the plaintiff may have had the rightful possession. The judgment does not, therefore, settle the title, and is not an estoppel to a real action, whether pleaded or offered in evidence.² So a judgment for defendant in trespass quare clausum does not necessarily settle anything beyond the particular facts of the trespass sued for, and is not conclusive upon the title,

because the right of possession only, and not the title, is involved in an action of trespass.³ Nor is it conclusive upon the right of possession even, at a subsequent time, because intervening events may have restored the plaintiff to possession, or terminated the possession or right which the defendant had at the time of the former trial.⁴ But the question of title to realty may be raised in an action of trespass quare clausum, as where the defendants insist that they had a right to do what they did, because they were the owners and entitled to the possession of the property, and the plaintiffs were trespassers thereon.⁵ And the record of a judgment in such action, if the question of title was put in issue, tried and passed upon, is admissible evidence in a subsequent writ of entry between the same parties to recover the same land, even if it does not operate as a conclusive estoppel.⁶

1 Kimball v. Hilton, 92 Me. 214.

2 Kimball v. Hilton, 92 Me. 214; Young v. Pritchard, 75 Me. 513; and see Dunlap v. Glidden, 34 Me. 517; Green v. Thompson, 5 Me. 224; Keyser v. Sutherland, 59 Mich. 455.

3 Johnson v. Morse, 11 Allen, 540; Morse v. Marshall, 97 Mass. 519.

4 Thayer v. Carew, 13 Allen, 82; Stevens v. Taft, 8 Gray, 420; Perkins v. Parker, 10 Allen, 22.

5 Lyon v. Fairbank, 79 Wis. 456, 24 Am. St. Rep. 732; and see Warner v. Fountain, 28 Wis. 405; Stephenson v. Wilson, 37 Wis. 482.

6 White v. Chase, 128 Mass. 158. See Hoey v. Furman, 1 Pa. St. 295, 44 Am. Dec. 129.

§ 449. Judgment, Satisfaction of.

A party injured may sue several joint trespassers separately, and prosecute each suit to final judgment, but there can be but one satisfaction of the damages, and he must elect against whom he will take execution. This one satisfaction will operate as to all the wrongdoers, and when the party injured has received this, with costs in all the actions, his remedy is exhausted.¹

1 *Ayer v. Ashmead*, 31 Conn. 447, 83 Am. Dec. 154; *Lord v. Tiffany*, 98 N. Y. 412, 50 Am. Rep. 689; *Fleming v. McDonald*, 50 Ind. 278, 19 Am. Rep. 711.

§ 450. What Damages Recoverable.

Every unauthorized entry upon the land of another is a trespass, and whether the owner suffers substantial injury or not, he at least sustains a legal injury, entitling him to a verdict for some damages, though they may, under some circumstances, be so small as to be merely nominal.¹ In cases of injury to real estate the courts recognize two elements of damage: 1. The value of the thing taken, if it have any, after separation from the freehold; 2. The damage to the realty, if any, occasioned by the removal.² The party injured may be content to accept the market value of the thing taken, but if he asserts his right to go beyond this, so as to secure compensation for the damage done to his land because of the taking, then the measure of damages is the difference in the value of the land before and after the injury.³

This rule has been applied in the case of growing trees taken or destroyed.⁴ But in some jurisdictions the value of the trees only is recoverable.⁵ In case of loss or destruction of growing crops, the rule of damages is ordinarily the value of the crops standing on the ground, and not the loss as measured by the rental value of the land.⁶ In trespass for entering the plaintiff's close and cutting and removing his ice from the river, the measure of damages is the value of the ice as soon as severed and ready for removal.⁷ For willful trespass in cultivating the land of another the measure of damages is the fair market value of the crop thus produced.⁸ In trespass for cutting grass and selling it without lawful authority the measure of damages is held to be the value of the grass after it has been converted into hay.⁹ For a continued trespass on land the measure of damages is the rental value of the property during the period of the trespass.¹⁰ This rule applies in the absence of evidence of any special damage or of any circumstance of aggravation.¹¹ For trespass to part of a lot abutting on a street, the measure of damages is not the rental value of that part, but the injury to the entire lot, if any.¹² In trespass by a lessee to recover damages for the tearing down of a leased building and the removal of the lessee's effects therefrom, evidence of the market value of the building and contents is admissible.¹³ Where one, in good

faith, believing he owned the land, cuts trees therefrom, he is liable to the real owner only for the value of the trees at the time of the taking.¹⁴ In trespass quare clausum for taking animals *ferae naturae*, recovery is limited to the trespass.¹⁵ If one enters upon the premises of another, and obliterates a display advertisement, he is liable to the owner for the cost and expenses of replacing or restoring the sign to its former condition.¹⁶ The recovery in an action for trespass to real estate should be limited to the land owned and damages sustained when the action was commenced, and it is held error to award damages down to the date of the entry of judgment.¹⁷ Exemplary damages may be recovered in trespass quare clausum, if the facts would warrant such a recovery in any other form of action.¹⁸ Such damages are in general only allowable when fraud, malice, oppression, or other aggravating circumstances accompany the injuries complained of;¹⁹ and, when allowed, they should be proportioned to the actual damages sustained.²⁰ If the wrongful entry upon the land was effected in a wanton or reckless manner, exemplary damages may be awarded in addition to the damages recoverable for injuries inflicted on the person or fixtures of the party in possession.²¹ One who, intending to commit a trespass on public lands, by mistake commits a trespass upon lands of a private individual is liable for such

trespass in penal damages.²² Where a person went up in a balloon, and, descending in another's garden, became entangled, and called for help, whereupon a crowd broke into the garden and injured the fences and plants, he was held liable in trespass for the damage done to the garden.²³ Where the defendant caused land entered as a homestead to be washed away, the entryman's damage was held to be the value of the land.²⁴

1 *Brown v. Bridges*, 70 Tex. 664; *Nafe v. Hudson* (Tex. Ct. Civ. App.), 47 S. W. Rep. 675; *Baltimore etc. R. R. Co. v. Boyd*, 67 Md. 32, 1 Am. St. Rep. 362; *Empire Co. v. Bonanza Co.*, 67 Cal. 406; *Dixon v. Clow*, 24 Wend. 188; *Taylor v. Henniker*, 12 Ad. & E. 488; and see *Mosseller v. Deaver*, 106 N. C. 494, 19 Am. St. Rep. 540, and note.

2 See *Dwight v. Railroad Co.*, 132 N. Y. 199, 28 Am. St. Rep. 563; *Ensley v. Mayor*, 2 Baxt. 144; *Foote v. Merrill*, 54 N. H. 490, 20 Am. Rep. 151.

3 *Dwight v. Railroad Co.*, 132 N. Y. 199, 28 Am. St. Rep. 563; and see *Illinois etc. R. R. Co. v. Le Blanc*, 74 Miss. 626.

4 *Id.*; *Argotsinger v. Vines*, 82 N. Y. 308; *Disbrow v. Hardwood Co.*, 45 N. Y. Supp. 376; *Montgomery v. Locke*, 72 Cal. 75; *Shearer v. Park Nursery Co.*, 103 Cal. 420, 42 Am. St. Rep. 128; *Hayes v. Railroad Co.*, 45 Minn. 17. Action for statutory penalty for wrongfully cutting trees: See *Louisville etc. R. R. Co. v. Hill*, 115 Ala. 334.

5 See *Tilden v. Johnson*, 52 Vt. 628, 36 Am. Rep. 769; *Tuttle v. Wilson*, 52 Wis. 643; *Gates v. Comstock*, 113 Mich. 127; *Railway Co. v. Hutchins*, 32 Ohio St. 571, 30 Am. Rep. 629; *Land etc. Co. v. Deer Lake Co.*, 60 Mich. 143, 1 Am. St. Rep. 491; *Powers v. Tilley*, 87 Me. 34, 47 Am. St. Rep. 304.

6 *Byrne v. Railway Co.*, 38 Minn. 212, 8 Am. St. Rep. 668, and note. Compare *Chicago v. Huenerbein*, 85 Ill. 591, 28 Am. Rep. 626.

- 7 *Piper v. Connelly*, 108 Ill. 648.
- 8 *Negley v. Cowell*, 91 Iowa, 256, 51 Am. St. Rep. 344. See *Murphy v. Railroad Co.*, 55 Iowa, 473, 39 Am. Rep. 175.
- 9 *Benjamin v. Benjamin*, 15 Conn. 347, 39 Am. Dec. 384.
- 10 *Eno v. Christ*, 54 N. Y. Supp. 400, 25 Misc. Rep. 24; *Story v. Railroad Co.*, 90 N. Y. 122, 43 Am. Rep. 146; *Uline v. Railroad Co.*, 101 N. Y. 98, 53 Am. Rep. 123; *Wheelock v. Noonan*, 108 N. Y. 179, 2 Am. St. Rep. 405; *De Camp v. Thompson*, 159 N. Y. 444, 70 Am. St. Rep. 570; 31 N. Y. App. Div. 634; *Whipple v. Fair Haven*, 63 Vt. 221.
- 11 *Tome Institute v. Crothers*, 87 Md. 569.
- 12 *Kenyon v. Railroad Co.*, 51 N. Y. Supp. 386; 29 N. Y. App. Div. 80.
- 13 *Froelich v. Morse*, 15 Wash. 636; and see *Curtiss v. Hoyt*, 19 Conn. 154, 48 Am. Dec. 149.
- 14 *Bond v. Griffin*, 74 Miss. 599; *Illinois etc. R. R. Co. v. Le Blanc*, 74 Miss. 626. Compare *Eaton v. Langley*, 65 Ark. 448; *Isle Royale Min. Co. v. Hertin*, 37 Mich. 332, 26 Am. Rep. 525.
- 15 *Beach v. Morgan*, 67 N. H. 529, 68 Am. St. Rep. 692.
- 16 *Shiverick v. Gunning Co.*, 58 Neb. 29.
- 17 *Kenyon v. Railroad Co.*, 29 N. Y. App. Div. 80; 51 N. Y. Supp. 386; *Uline v. Railroad Co.*, 101 N. Y. 98, 54 Am. Rep. 661; *Tallman v. Railroad Co.*, 121 N. Y. 119; *Stowers v. Gilbert*, 156 N. Y. 600; *Cumberland Land Co. v. Hitchings*, 65 Me. 140.
- 18 *Perkins v. Towle*, 43 N. H. 220, 80 Am. Dec. 149.
- 19 *Merrills v. Manufacturing Co.*, 10 Conn. 384, 27 Am. Dec. 682; *Keil v. Gas Co.*, 131 Pa. St. 466, 17 Am. St. Rep. 823.
- 20 *Railroad Co. v. Telephone etc. Co.*, 69 Tex. 277, 5 Am. St. Rep. 45.
- 21 *Mosseller v. Deaver*, 106 N. C. 494, 19 Am. St. Rep. 540; *Trainer v. Wolff*, 58 N. J. L. 381.
- 22 *Perkins v. Hackleman*, 26 Miss. 41, 59 Am. Dec. 243.
- 23 *Guille v. Swan*, 19 Johns. 381, 10 Am. Dec. 234.

24 *Gulf etc. R. R. Co. v. Clark* (Ct. App., Ind. Ter.), 51 S. W. Rep. 962.

§ 451. Same—*Damnum Absque Injuria*.

The maxim, *De minimis non curat lex*, does not apply to the positive and wrongful invasion of another's property. And the right to maintain an action for the value of property of which the owner is wrongfully deprived is never denied.¹ But there are many acts which the owner of land may lawfully do, and which, though attended with annoyance and injury to his neighbor, are *damnum absque injuria*, and no action lies therefor.² The controlling principle is, that a landowner cannot be held responsible for all possible consequences that may result from his lawful acts done on his own land.³

1 *Seneca Road v. Railroad Co.*, 5 Hill, 170; *Camden v. Green*, 54 N. J. L. 591, 33 Am. St. Rep. 686; and see *Blodgett v. Stone*, 60 N. H. 167; *New York Rubber Co. v. Rothery*, 132 N. Y. 293, 28 Am. St. Rep. 575; *Hatch v. Donnell*, 74 Me. 163.

2 *Booth v. Railroad Co.*, 140 N. Y. 267, 37 Am. St. Rep. 552; also, sec. 435, ante, where the authorities are collected.

3 *Gregory v. Layton*, 36 S. C. 93, 31 Am. St. Rep. 857.

§ 452. Remedy by Injunction.

As a general rule, a court of equity will refuse to take jurisdiction and award even a temporary injunction in cases of a mere trespass of ordinary character.¹ But when the nature of the tres-

pass is such as to lead to a multiplicity of actions, or the injury goes to the destruction of the estate in the manner in which it is enjoyed, or the trespass cannot be adequately compensated in damages, and the remedy at law is plainly inadequate, equity will grant relief by injunction.² The remedy by injunction may be successfully invoked to restrain acts, or threatened acts, of trespass in any instance where such acts are or may be an irreparable damage to the particular species of property involved, as in cases of mines, timber, and the like.³ And where trespasses upon land are continuous, the owner has a right to invoke the power of a court of equity to restrain such trespasses, and thus prevent a multiplicity of suits.⁴ As illustrations of the foregoing principles, it has been held that an injunction will lie against the removal from the plaintiff's premises of wood wrongfully cut by the defendant thereon;⁵ to restrain a threatened trespass in increasing the height of a party-wall;⁶ to restrain trespassers from hunting upon a game preserve without right;⁷ to restrain a continuing trespass on a mining claim by the removal of valuable ores, and to compel an accounting for injuries already inflicted;⁸ and a husband who has lost his homestead right in the property of his wife by a divorce obtained against him may be enjoined from the commission of trespasses, petty annoyances, and acts of disorderly conduct on the

homestead premises.⁹ So a license to fish is a franchise which entitles the holder to maintain an action for injunction against any infraction of his rights.¹⁰

1 *Smith v. Gardner*, 12 Or. 221, 53 Am. Rep. 342; *Port of Mobile v. Railroad Co.*, 84 Ala. 115, 5 Am. St. Rep. 342; *Allen v. Dunlap*, 24 Or. 232; *Colby v. Spokane*, 12 Wash. 690.

2 *Mendenhall v. Water Co.*, 27 Or. 38; *Garrett v. Bishop*, 27 Or. 349; *Tantlinger v. Sullivan*, 80 Iowa, 218; *Lewis v. North Kingstown*, 16 R. I. 15, 27 Am. St. Rep. 724; *Ellis v. Wren*, 84 Ky. 254.

3 *Bishop v. Baisley*, 28 Or. 119, 145; *Disbrow v. Hardwood Co.*, 45 N. Y. Supp. 376; 17 N. Y. App. Div. 610; *Kellogg v. King*, 114 Cal. 378, 55 Am. St. Rep. 74; *Mills v. Seed Co.*, 65 Miss. 391, 7 Am. St. Rep. 671; *Lembeck v. Nye*, 47 Ohio St. 336, 21 Am. St. Rep. 828.

4 *Coatsworth v. Railroad Co.*, 156 N. Y. 451; *Garvey v. Railroad Co.*, 159 N. Y. 323, 70 Am. St. Rep. 550; *Walters v. McElroy*, 151 Pa. St. 549.

5 *Disbrow v. Hardwood Co.*, 45 N. Y. Supp. 376, 17 N. Y. App. Div. 610.

6 *Calmelet v. Sichi*, 48 Neb. 505, 58 Am. St. Rep. 700. See *Everett v. Edwards*, 149 Mass. 588, 14 Am. St. Rep. 462.

7 *Kellogg v. King*, 114 Cal. 378, 55 Am. St. Rep. 74.

8 *Bishop v. Baisley*, 28 Or. 119.

9 *Kern v. Field*, 68 Minn. 317, 64 Am. St. Rep. 479.

10 *Walker v. Stone*, 17 Wash. 578.

§ 453. Same—Injunction Denied When.

It is held that one who has sold bricks upon his own land, to be removed within a certain time, is not entitled to an injunction restraining the purchaser from removing them at a later day.¹ So for a mere trespass in mining and tak-

ing away coal from the lands of another, without right, the law furnishes an adequate remedy in the action of trespass, and an injunction will not lie.² Nor will an injunction lie to restrain a saloon business adjacent to plaintiff's place of business, in which a number of men are employed, whose sobriety is necessary to secure the best results from the plaintiff's business.³ Nor is it error to deny a temporary injunction against alleged threatened acts of trespass, when the defendant, both by answer and affidavit, disclaims any right to commit the acts, and positively denies that he ever intended or threatened to commit them.⁴ And to warrant interference by injunction to restrain trespass, it is held that the plaintiff's title must be undisputed, or established by legal adjudication.⁵ But the fact that a trespass upon one's rights is a misdemeanor punishable criminally does not militate against the right to protection in equity.⁶

1 Gates v. Lumber Co., 172 Mass. 495.

2 Rice v. Looney, 81 Ill. App. 537.

3 Wilkeson Coal etc. Co. v. Driver, 9 Wash. 177; and so, to same effect, Railroad Co. v. Whalen, 149 U. S. 157.

4 Hagemeyer v. St. Michael. 70 Minn. 482.

5 Schoonover v. Bright, 24 W. Va. 698; Colby v. Spokane, 12 Wash. 690. See Wilkeson Coal etc. Co. v. Driver, 9 Wash. 177; Bishop v. Baisley, 28 Or. 119.

6 Walker v. Stone, 17 Wash. 578.

§ 454. Same—Pleading, etc.

It is not sufficient that a bill for an injunction to restrain trespass on land contains mere general averments of irreparable injury, but the facts constituting such injury must be set forth.¹ So it is held that a bill to restrain the mining and removal of coal from the complainant's premises, when there is no averment of irreparable injury and insolvency of the defendant, is insufficient.² A judgment enjoining a trespass upon land, and adjudging the land to plaintiff, should so describe the land that it may be identified without reference to any other paper.³ When the remedy invoked for a private trespass upon land is a suit in equity for an injunction and damages, the plaintiff can recover, together with an injunction against future trespass, only his damages up to the entry of judgment, and a recovery on the basis of permanent damages is not permissible.⁴

1 *Schoonover v. Bright*, 24 W. Va. 698; *Watson v. Ferrell*, 34 W. Va. 406.

2 *Rice v. Looney*, 81 Ill. App. 537. Sufficiency of complaint by owner in fee of premises within the bounds of a street to restrain the maintenance of a railroad bridge: See *Coatsworth v. Railroad Co.*, 156 N. Y. 451.

3 *Wallace v. Friend* (Ct. App., Ky.), 49 S. W. Rep. 181.

4 *Stowers v. Gilbert*, 156 N. Y. 600; reversing 85 Hun, 468. See *Garvey v. Railroad Co.*, 159 N. Y. 323, 70 Am. St. Rep. 550.

§ 455. Trespass to Try Title.

At common law, the action of trespass quare clausum fregit is not properly an action to try title, and the question of title does not necessarily arise. When the matter is not regulated by statute, the judgment in such action settles nothing in regard to the title beyond the action tried.¹ By statute, in some jurisdictions, an action to try title in the form of trespass quare clausum has been substituted for the action of ejectment. Thus, under Texas statutes, the remedy of trespass to try title is broad enough to embrace every character of litigation affecting title to real estate.² But the principles of law applicable to actions of ejectment are nevertheless the rules of action and construction to be applied in suits of trespass to try title.³ The remedy may be used where the object is to recover possession of the land unlawfully withheld from the owner, and to which he has the right of immediate possession, whether the defendant claims under title or is a mere trespasser.⁴ A less estate than a fee simple may form the basis for the action.⁵ The burden of showing a right to recover is upon the plaintiff, and if neither he nor the defendant shows a right to the possession, judgment must be rendered in favor of the defendant.⁶ Possession alone is sufficient evidence in behalf of the plaintiff to enable him to recover against a mere trespasser.⁷ If the de-

fendant has equities which entitle him to require the plaintiff to pay his debt before recovering the property, he should set them up in his answer, and he is not entitled to affirmative relief under the plea of not guilty.⁸ Action of trespass to try titles formerly in use in South Carolina was not identical in all respects with an action of ejectment, and embraced three elements, namely, the writ of right to try the title, ejectment to recover the possession, and also for mesne profits.⁹ This action has been superseded by an action for the recovery of real property, provided by the Code of Civil Procedure adopted in 1870, which action, it is held, cannot be maintained unless there has been an actual trespass by the defendant himself in person, or through and by another as his agent or tenant.¹⁰ If a complaint in an action for trespass to land and to enjoin further trespass alleges that the plaintiff is in possession and seised in fee, a denial of these allegations raises an issue as to title triable on the law side of the court.¹¹ In Pennsylvania, the right exists to bring trespass for an original tort for the purpose of trying title, and the judgment in such an action has the same effect on the question of title as a judgment in ejectment.¹² The defendant in trespass to try title cannot avail himself of an outstanding equitable title with which he does not connect himself to defeat the plaintiff's recovery.¹³

1 *Chandler v. Walker*, 21 N. H. 282, 53 Am. Dec. 202; and see sec. 448, ante.

2 *Titus v. Johnson*, 50 Tex. 224; *Hardy v. Beaty*, 84 Tex. 562, 31 Am. St. Rep. 80; *Easterling v. Blythe*, 7 Tex. 210, 56 Am. Dec. 45; *Lamb v. Beaumont Hall*, 2 Tex. Civ. App. 289; *Johnson v. Bryan*, 62 Tex. 623.

3 *Hough v. Hammond*, 36 Tex. 657; *Tyler v. Davis*, 61 Tex. 674.

4 *Hays v. Railway Co.*, 62 Tex. 397.

5 *Thurber v. Conners*, 57 Tex. 96.

6 *Allen v. Long*, 80 Tex. 261, 26 Am. St. Rep. 735.

7 *Parker v. Railway Co.*, 71 Tex. 132.

8 *Fuller v. O'Neal*, 69 Tex. 349, 5 Am. St. Rep. 59.

9 See *Geiger v. Kaigler*, 15 S. C. 262.

10 *Anderson v. Lynch*, 37 S. C. 575.

11 *Heyward v. Farmers' Mining Co.*, 42 S. C. 138, 46 Am. St. Rep. 702.

12 *Smucker v. Pennsylvania R. R. Co.*, 6 Pa. Sup. Ct. 521.

13 *Settegast v. O'Donnell*, 16 Tex. Civ. App. 56.

CHAPTER XXXII.

EJECTMENT.

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§ 456. Nature of the Remedy.

At common law, ejectment is a fictitious remedy to try the title to the possession of lands.¹ In form it is a trick between two to dispossess a third by a sham suit and judgment.² Ejectment was originally classed as a possessory action;³ and is still so regarded in some jurisdictions.⁴ But the action is now in very extensive use for trying titles to land. Thus, in New York, this action tests not only the right to possession, but the title under which the right exists.⁵ And this is so generally in the several states which have adopted codes of procedure. A few of the states still retain the action in substantially the same form in which it existed at common law. Ejectment, in Pennsylvania, is an equitable action, and lies to enforce the execution of a trust, or the execution of a conveyance.⁶

1 Doe v. Pegge, 1 Term Rep. 759, note; and see Walker v. Walker, 63 N. H. 321, 56 Am. Rep. 514.

2 Fairclaim v. Sham Title, 3 Burr. 1294; and see 3 Blackstone's Commentaries, 200. For a full description of the remedy as it existed at common law, see Den v. Morris, 7 N. J. L. 6, 11 Am. Dec. 508; Patterson v. Brindle, 9 Watts, 98; Doe v. Rutler, 6 Ga. 88.

3 See McFarland v. Goodman, 6 Biss. 111; Dickerson v. Colgrove, 100 U. S. 582.

4 Wells v. Steckelberg, 52 Neb. 597, 66 Am. St. Rep. 529; Covert v. Morrison, 49 Mich. 133; Hill v. Plunkett, 41 Ark. 465; Pier v. Fond Du Lac, 38 Wis. 470; Improvement Co. v. Mayor etc., 36 N. J. L. 540.

5 Cagger v. Lansing, 64 N. Y. 417, 428; and see Moring v. Ables, 62 Miss. 263, 52 Am. Rep. 186.

6 Peebles v. Reading, 8 Serg. & R. 484.

§ 457. For What Ejectment Lies, Generally.

In general terms, ejectment will lie wherever a right of entry exists, and the interest is tangible, so that possession can be delivered.¹ It lies only to recover things corporeal, which may be the subjects of seisin, entry, and possession.² Such is the prevailing rule in the United States unless in some way changed by statute.³ Permanent fixtures, being in the nature of real estate, may be recovered in ejectment.⁴ So a room in a house is a part of the real estate, and is recoverable in ejectment.⁵ So it was held that one is liable in ejectment for a projection of his roof over another's land.⁶ Ejectment will lie for the recovery of lands claimed and condemned as the roadbed and right of way of a railroad.⁷ The railroad company must, from the very nature

of its attitude, in order to give security to its passengers and workmen, and secure the enjoyment of the road, have at all times the right to the exclusive occupancy of the lands taken, and to exclude all concurrent occupancy by the former owner for any purpose, and ejectment is a proper remedy in such case.⁸ So ejectment will lie in favor of a city for lands dedicated for a street.⁹ And it is held that ejectment will lie against a city, by the owner of land wrongfully taken by the city and converted into and used as a public street.¹⁰ It will also lie against a county to recover land wrongfully taken and converted into a public road.¹¹ Ejectment lies by an abutting lot owner in a city against one who ousts him of the use and possession of the land lying between his lot and the center of the street.¹² It has also been held that an action in the nature of ejectment will lie by a riparian proprietor to recover possession of what had been unreclaimed tide-water flats adjacent to his land, upon which the owner of the adjoining land has wrongfully, though under a claim of right, constructed a wharf.¹³ The owner of the fee in a public highway may maintain ejectment against a telegraph company which has without right constructed its line along the highway;¹⁴ and the right to bring the action passes to such owner's grantee.¹⁵ Ejectment will lie for accretions or alluvion;¹⁶ to recover possession of a chattel

real;¹⁷ to recover the possession of land which is subject to either a public or private easement.¹⁸ In respect to the last mentioned, it is said that the right to a fee and the right to an easement in the same estate are rights independent of each other, and may well subsist together when vested in different persons. Each can maintain an action to vindicate and establish his right, the former to protect and enforce his seisin of the fee, the latter to prevent a disturbance of his easement.¹⁹ Land over which a railroad has been built and put into operation, notwithstanding the public interest in its operation, may be recovered in ejectment by the owner, provided he has not by his conduct estopped himself, and the mere fact that he acquiesced in the building of the road until it was completed and put into operation does not amount to an estoppel.²⁰ A real action lies at common law for a remainder of land in fee expectant on the termination of a life estate.²¹ It is well settled that ejectment will lie to recover possession of a mining claim.²² The action will lie for mines though another has the surface.²³ Where a lease of mining land contained a clause that it was to be forfeited, and that the lessor could re-enter upon a failure by the lessee to perform the conditions thereof, it was held that ejectment would lie to dispossess the lessee upon a breach of the condition.²⁴ It is no objection to a recovery in ejectment that

the land in controversy happens to be inaccessible during the trial, or at the time judgment is entered, so that the officer cannot deliver possession.²⁵

1 *Winona v. Huff*, 11 Minn. 119; *Southern Pac. Co. v. Burr*, 86 Cal. 279.

2 *Racine v. Crotsenberg*, 61 Wis. 481, 50 Am. Rep. 149; *Den v. Craig*, 15 N. J. L. 191; *Smith v. Wiggin*, 48 N. H. 105; *Graves v. Amoskeag Co.*, 44 N. H. 462; *Hancock v. McAvoy*, 151 Pa. St. 460, 31 Am. St. Rep. 774; *Black v. Hepburne*, 2 Yeates, 333; *Southern Pac. Co. v. Burr*, 86 Cal. 279.

3 See *Child v. Chappell*, 9 N. Y. 246; *Nichols v. Lewis*, 15 Conn. 137.

4 *Hill v. Hill*, 43 Pa. St. 521; and see *King v. Catlin*, 1 Tyler, 355.

5 *White v. White*, 16 N. J. L. 202, 31 Am. Dec. 232.

6 *Murphy v. Bolger*, 60 Vt. 723; so, to same effect, *McCourt v. Eckstein*, 22 Wis. 153, 94 Am. Dec. 594; *Zander v. Brewing Co.*, 89 Wis. 164. But see, contra, *Vrooman v. Jackson*, 6 Hun, 326; *Aiken v. Benedict*, 39 Barb. 400. See, also, on this subject, *Leprell v. Kleinschmidt*, 112 N. Y. 364; *Harrington v. Port Huron*, 86 Mich. 46; *Rasch v. Noth*, 99 Wis. 285, 67 Am. St. Rep. 858.

7 *Tennessee etc. R. R. Co. v. East Ala. Ry. Co.*, 75 Ala. 516, 51 Am. Rep. 475.

8 *Rutland Ry. Co. v. Chaffee*, 71 Vt. 84; and see, also, *Troy etc. R. R. Co. v. Potter*, 42 Vt. 265, 1 Am. Rep. 325; *Central Pac. Ry. Co. v. Benity*, 5 Saw. 118.

9 *Hoboken etc. Imp. Co. v. Mayor etc.*, 36 N. J. L. 540; *Price v. Plainfield*, 40 N. J. L. 608; and see *Ocean Grove etc. Assn. v. Berthall*, 63 N. J. L. 312.

10 *Armstrong v. St. Louis*, 69 Mo. 309, 33 Am. Rep. 499; and see *Anderson v. St. Louis*, 47 Mo. 484; *Walker v. Chicago etc. R. R. Co.*, 57 Mo. 275.

11 *McCarty v. Clark County*, 101 Mo. 179.

12 *Smeberg v. Cunningham*, 96 Mich. 378, 35 Am. St. Rep. 613; *Thomas v. Hunt*, 134 Mo. 392.

13 Seamen's Friend Soc. v. Halstead, 58 Conn. 145, 152; Ockerhausen v. Tyson, 71 Conn. 31; Nichols v. Lewis, 15 Conn. 137.

14 Postal Tel. Co. v. Eaton, 170 Ill. 513, 62 Am. St. Rep. 390; and see Louisville etc. R. R. Co. v. Hess, 92 Ky. 407.

15 Postal Tel. Co. v. Eaton, 170 Ill. 513, 62 Am. St. Rep. 390; and see Wager v. Railroad Co., 25 N. Y. 526; Bradley v. Railway Co., 91 Mo. 493.

16 Baltimore etc. R. R. Co. v. Chase, 43 Md. 23; Lovington v. County of St. Clair, 64 Ill. 56, 16 Am. Rep. 516.

17 Fiske v. Brayman, 21 R. I. 195.

18 Tillmes v. Marsh, 67 Pa. St. 507; Blake v. Ham, 50 Me. 311; First Nat. Bank v. Morrison, 88 Me. 162; Strong v. Brooklyn, 68 N. Y. 11; Coburn v. Ames, 52 Cal. 385, 28 Am. Rep. 634.

19 Bigelow, J., in Morgan v. Moore, 3 Gray, 319, 322; approved, Burnet v. Crane, 56 N. J. L. 285, 287, 44 Am. St. Rep. 395; and see Warwick v. Mayo, 15 Gratt. 528; Aqueduct Co. v. Chandler, 9 Allen, 159; Ayer v. Phillips, 69 Me. 50.

20 Louisville etc. R. R. Co. v. Hess, 92 Ky. 407; and see Weyl v. Railroad Co., 69 Cal. 202; Phillips v. Railroad Co., 78 Pa. St. 177. In Tennessee a remedy is provided by statute, and does not include ejectment: Saunders v. Railroad Co., 101 Tenn. 206.

21 Walker v. Walker, 63 N. H. 321, 56 Am. Rep. 514.

22 See Rader v. Allen, 27 Or. 344; Trevaskis v. Peard, 111 Cal. 599; Aurora Hill etc. Min. Co. v. Mining Co., 34 Fed. Rep. 515.

23 Beatty v. Gregory, 17 Iowa, 109, 85 Am. Dec. 546; Turner v. Reynolds, 23 Pa. St. 199.

24 Kirk v. Mattier, 140 Mo. 23.

25 Woodhull v. Rosenthal, 61 N. Y. 382.

§ 458. For What Ejectment Does not Lie.

Ejectment will not lie, at common law, for things incorporeal or intangible.¹ It will not lie

for a mere easement, or mere license.² And it is held that the right of sepulture in the burying ground of a cemetery corporation subject to its regulations is a mere license, and will not sustain ejectment.³ A grant of water is not the grant of the soil on which it rests, and it passes nothing for which ejectment will lie.⁴ Ejectment will not lie to recover possession of a watercourse;⁵ nor will it lie for flooding the lands of the plaintiff by a dam;⁶ nor by a riparian proprietor for that portion of a wharf, constructed on his land, which extends below low-water mark;⁷ nor, it has been held, can a city maintain ejectment for a street the fee of which it does not own.⁸ But the better opinion is, that ejectment may be maintained by a municipal corporation for the recovery of possession of a street wrongfully possessed by an individual, whether the corporation owns the fee, or the adjoining proprietor retains it.⁹ A ferry franchise ranks as an incorporeal hereditament, and ejectment will not lie for its recovery.¹⁰ So a right or privilege of boring for oil or minerals is held to be an incorporeal hereditament only, and for a disturbance of the right ejectment cannot be maintained.¹¹ Ejectment does not lie to try the right to a road or right of way.¹² Nor does it lie in behalf of an heir as against an administrator to recover possession of land to which the latter is entitled as an asset of the estate.¹³ Under the Virginia statute (Code

1873, c. 131, sec. 5), ejectment lies for an incorporeal hereditament. It is accordingly held that a right to quarry and remove limestone from a tract of land constitutes a foundation for an action of ejectment.¹⁴ Generally speaking, a grant from the state will support the action.¹⁵ And ejectment is held to be the proper remedy where a railway company claiming land under a prior grant of the government seeks to obtain possession as against parties holding the land under a subsequent patent from the United States.¹⁶

1 Den v. Craig, 15 N. J. L. 191; Child v. Chappell, 9 N. Y. 246.

2 Southern Pac. Co. v. Burr, 86 Cal. 279; Winona v. Huff, 11 Minn. 119; Funk v. Haldeman, 53 Pa. St. 239; Fritsche v. Fritsche, 77 Wis. 270.

3 Hancock v. McAvoy, 151 Pa. St. 460, 31 Am. St. Rep. 774; and see Craig v. First Presby. Church, 88 Pa. St. 42, 32 Am. Rep. 417.

4 Dark v. Johnston, 55 Pa. St. 164, 93 Am. Dec. 732.

5 Swift v. Goodrich, 70 Cal. 103.

6 Ezzard v. Mining Co., 74 Ga. 520, 58 Am. Rep. 445.

7 Coburn v. Ames, 52 Cal. 385, 28 Am. Rep. 634; Parker v. Packing Co., 17 Or. 510. Compare Ockerhausen v. Tyson, 71 Conn. 31; Gibson v. Kelly, 15 Mont. 417.

8 Racine v. Crotsenberg, 61 Wis. 481, 50 Am. Rep. 149.

9 Visalia v. Jacob, 65 Cal. 436, 52 Am. Rep. 303; Eureka v. Gates, 120 Cal. 54; Mayor etc. v. Law, 125 N. Y. 380; and see sec. 457, ante.

10 Mayor v. Ferry Co., 55 How Pr. 138, 142; Rees v. Lawless, Litt. Sel. Cas. 184, 12 Am. Dec. 295.

11 Union Petroleum Co. v. Petroleum Co., 72 Pa. St. 173; and see Petroleum Co. v. Coal etc. Co., 89 Tenn. 381; Indianapolis Natural Gas Co. v. Kibbey, 135 Ind. 357.

12 *Wood v. Turnpike Co.*, 24 Cal. 488; and see *Child v. Chappell*, 9 N. Y. 246, 251.

13 *Barco v. Fennell*, 24 Fla. 378.

14 *Reynolds v. Cook*, 83 Va. 817, 5 Am. St. Rep. 317.

15 *Blakslee Mfg. Co. v. Iron Works*, 59 Hun, 209.

16 *Northern Pac. Ry. Co. v. Miller*, 20 Wash. 21.

§ 459. What Title or Possession Necessary to Recovery in Ejectment.

To authorize a recovery in ejectment at common law, except as against a mere trespasser, the plaintiff must show that he had the legal title at the commencement of the suit, that he was entitled to the possession of the land, and that the defendant was then in possession.¹ The prevailing rule is, that only legal titles can be investigated in an action of ejectment.² In such action the plaintiff must recover, if at all, upon the strength of his own title, and not upon the weakness of that of his adversary.³ Moreover, to support ejectment, the plaintiff must have title at the commencement of the suit, and a title subsequently accruing will not authorize a recovery.⁴ And where several plaintiffs in ejectment count upon a joint title and right of possession, they must each and all show that such legal title and right of possession exists at the time of trial, as well as at the commencement of the suit, or they cannot sustain the action.⁵ But while it is true that the plaintiff in ejectment must recover on the strength of his own title, and not on the

defects in that of his adversary, yet it is equally well settled that where no title appears on either side, the prior possession of the plaintiff, though short of the statutory bar, will prevail over a subsequent possession by the defendant which has not ripened into a title, provided the plaintiff's possession is under a claim of right or color of title and not voluntarily abandoned, and such prior possession, as against a naked trespasser, is sufficient for a recovery.⁶ A title apparently good is held to be sufficient against a mere trespasser.⁷ So possession alone is held sufficient to sustain ejectment against a mere intruder.⁸ One who holds possession of real estate under a claim of ownership is entitled to recover the same as against one who has no right or title thereto.⁹ Where a grantee in a deed, which is inoperative as a conveyance, takes possession under such deed, he can maintain ejectment, and is entitled to recover upon the strength of that possession, against anyone subsequently coming into possession and showing no superior right to retain it.¹⁰ And it is held that the possession of land during the full period of limitation, under such circumstances as would make a valid defense, amounts to an investiture of title, which may be actively asserted in all respects as effectively as if acquired by deed.¹¹ To have such effect the possession must have been continued for the statutory period under the original hostile entry, and

each succeeding occupant must show title under his predecessor, and his possession be referable to such entry.¹² Evidence of adverse possession for a period less than the prescribed time is held not to be even a circumstance to go to the jury as tending to show title in an action of ejectment.¹³ In Georgia, prior possession of land under a claim of ownership is *prima facie* evidence of title in the occupant, upon which he may recover in ejectment, unless the defendant shows a better adverse title, by possession or otherwise.¹⁴ The doctrine maintained by the Florida court is, that unless the plaintiff in ejectment can show a perfect title, or an actual possession in himself or in his grantor, prior to that of the defendant, he cannot recover.¹⁵ In Texas, the principle that one having prior possession of land can recover against a trespasser on proof of such prior possession merely is extended to cases in which the entry was without actual force and under a claim of right.¹⁶ Mere prior possession of land, which is afterward included in a grant to a railroad of a right of way, held insufficient to sustain ejectment as against the railroad.¹⁷ In Tennessee, ejectment is distinctively a real action, and looks only to legal title;¹⁸ and the plaintiff in ejectment cannot recover, even against a naked trespasser, without proof of a perfect title, either by deraignment from the state or by seven years'

adverse possession under the required color of title.¹⁹

1 Fleming v. Johnson, 26 Ark. 421; Finley v. Babb, 144 Mo. 403; Clay v. Maye, 144 Mo. 376; O'Connell v. Dougherty, 32 Cal. 458; Schrack v. Zubler, 34 Pa. St. 38; Goodman v. Winter, 64 Ala. 411, 38 Am. Rep. 13.

2 Kirkpatrick v. Clark, 132 Ill. 342, 22 Am. St. Rep. 531; Linnertz v. Dorway, 175 Ill. 508, 67 Am. St. Rep. 232; Simmons v. Richardson, 107 Ala. 697; Crawford v. Whitmore, 120 Mo. 144; Windsor v. Bacon, 7 Houst. 1; Caperton v. Hall, 118 Ala. 265.

3 McCauley v. Mahon, 174 Ill. 384; Auburn v. Goodwin, 128 Ill. 57; Mather v. Walsh, 107 Mo. 121; Wentworth v. Abbetts, 78 Wis. 63; Snyder v. Parker, 19 Wash. 276, 67 Am. St. Rep. 726; Wallace v. Swinton, 64 N. Y. 188; Shockley v. Starr, 119 Ind. 172; Cox v. Arnold, 129 Mo. 337, 50 Am. St. Rep. 450; Wilson v. Leary, 120 N. C. 90, 58 Am. St. Rep. 778; Chicago etc. R. R. Co. v. Schalkopf, 54 Neb. 448; Omaha etc. Trust Co. v. Krayscow, 47 Neb. 592; Brown v. Baraboo, 98 Wis. 273; King v. Mullins, 171 U. S. 404.

4 Pollard v. Hanrick, 74 Ala. 334; Percifull v. Platt, 36 Ark. 456; Dickinson v. Thornton, 65 Ark. 610; Alden v. Grove, 18 Pa. St. 377.

5 Cheney v. Cheney, 26 Vt. 606.

6 White v. Keller, 114 Mo. 479; Bains v. Bullock, 129 Mo. 117; Hall v. Gallemore, 138 Mo. 638; Green v. Jordan, 83 Ala. 221, 3 Am. St. Rep. 711; Louisville etc. R. R. Co. v. Philyaw, 88 Ala. 264; Shoe Co. v. Williamson, 64 Ark. 100; Christy v. Richolson, 48 Kan. 177; Cook v. Bertram, 86 Mich. 356; Sears v. Taylor, 4 Colo. 38.

7 Zeringue v. Williams, 15 La. Ann. 76.

8 Bates v. Campbell, 25 Wis. 613; Burt v. Panjaud, 99 U. S. 182; and see Leonard v. Flynn, 89 Cal. 546.

9 Hentig v. Pipher, 58 Kan. 788; Eagle Mfg. Co. v. Gibson, 62 Ala. 369.

10 Branch v. Smith, 114 Ala. 463; and see Brashear v. Hewitt, 4 Har. & McH. 222.

11 Jacks v. Chaffin, 34 Ark. 534; Harrelson v. Sarvis, 39 S. C. 14; Duren v. Kee, 50 S. C. 444. See, also, Den

v. Wright, 7 N. J. L. 175, 11 Am. Dec. 546; Patten v. Scott, 118 Pa. St. 115, 4 Am. St. Rep. 576; Solomon v. Yrisarri, 9 N. Mex. 480.

12 Witt v. St. Paul etc. Ry. Co., 38 Minn. 122.

13 King v. Wells, 94 N. C. 344; Bernhardt v. Brown, 122 N. C. 587, 65 Am. St. Rep. 725.

14 Bleckley v. White, 98 Ga. 597; Sparks v. Conrad, 99 Ga. 643; Ellis v. Dasher, 101 Ga. 5.

15 L'Engle v. Reed, 27 Fla. 345. And see, in support of this ruling, Seymour v. Cresswell, 18 Fla. 29; Tapscott v. Cobbs, 11 Gratt. 172; Keane v. Cannovan, 21 Cal. 291, 82 Am. Dec. 738; Spitznagle v. Vanhessch, 13 Neb. 341; Russell v. Erwin, 38 Ala. 44; Anderson v. Rasmussen, 5 Wyo. 44.

16 Watkins v. Smith, 91 Tex. 589; and compare Jacks v. Dyer, 31 Ark. 334; Elofrson v. Lindsay, 97 Wis. 22. Sufficient possession of millsite to sustain ejectment: See Valcalda v. Silver Peak Mines, 86 Fed. Rep. 90.

17 Burton v. Laughrey, 18 Mont. 43. Compare Pacific Co. v. Burr, 86 Cal. 279.

18 King v. Coleman, 98 Tenn. 570; Garrett v. Belmont Land Co., 94 Tenn. 479; Langford v. Love, 3 Sneed, 311.

19 Hubbard v. Godfrey, 100 Tenn. 150.

§ 460. Equitable Title or Interest.

In the common-law action of ejectment, the plaintiff must recover upon the strength of his legal title. An equitable title will not sustain the action.¹ And where the plaintiff alleges a legal title, a recovery cannot be had by proof of an equitable title.² So, in the federal courts, it is well settled that legal and equitable claims cannot be blended together in one suit;³ and the plaintiff in ejectment can get no support for his title because of alleged estoppel or recognition

thereof by the defendant, but must stand or fall on his own legal title.⁴ But, in Pennsylvania, which state has no court of chancery, ejectment is an equitable action, and wherever chancery would execute a trust or decree a conveyance, the courts of the state, by the instrumentality of a jury, will direct a recovery in ejectment.⁵ So, by statute in a number of the states, an equitable title to real estate is sufficient to sustain an action to recover possession. Thus, under the code of Kansas, in an action of ejectment, the party having the better title may always recover, whatever that title may be, whether legal or equitable.⁶ So to the same effect under the statute of Texas;⁷ so under the Civil Code of Oklahoma.⁸ And it is a settled rule of law in North Carolina that the plaintiff in ejectment may recover upon an equitable title.⁹ So it has been held in Georgia that a plaintiff in ejectment may recover upon an equitable title when it is a perfect equity.¹⁰ One having an equitable title to realty, although he may have no right to recover possession by an action at law, has a real and substantial right to the land and its possession, which can be extinguished only by an actual, consecutive, adverse possession for the time required to extinguish legal title by prescription.¹¹

1 *Simmons v. Richardson*, 107 Ala. 697; *Paisley v. Holzshu*, 83 Md. 325; *Miller v. Courtney*, 152 U. S. 172.

2 Johnson v. Portious, 118 Ind. 270.

3 Scott v. Neely, 140 U. S. 106; Davis v. Davis, 72 Fed. Rep. 81; 18 C. C. A. 438.

4 Stone v. Perkins, 85 Fed. Rep. 616; Haltern v. Emmons, 46 Fed. Rep. 452; Carter v. Ruddy, 166 U. S. 493.

5 Peebles v. Reading, 8 Serg. & R. 484; and see Deitzler v. Mishler, 37 Pa. St. 82; Henderson v. Hays, 2 Watts, 148; McCullough v. Staver, 119 Pa. St. 432.

6 O'Brien v. Wetherell, 14 Kan. 616; Mooney v. Olsen, 21 Kan. 691; Jones v. Hollister, 51 Kan. 310.

7 Walker v. Howard, 34 Tex. 478.

8 Laughlin v. Fariss, 7 Okla. 1.

9 Murray v. Blackledge, 71 N. C. 492; Farmer v. Daniel, 82 N. C. 152; Condry v. Cheshire, 88 N. C. 375; Arrington v. Arrington, 114 N. C. 116.

10 Dodge v. Spiers, 85 Ga. 585.

11 Sherwood v. Baker, 105 Mo. 472, 24 Am. St. Rep. 399. See, also, Barrett v. Hinckley, 124 Ill. 32, 7 Am. St. Rep. 331.

§ 461. Tracing Title from Common Source.

It is an established general rule, applicable in the action of ejectment, that where title is claimed through a common grantor, it is sufficient to trace it to that source. Neither party need go back of the first conveyance from a common grantor, and whoever shows title under such conveyance must be awarded privity, as long as there is no evidence assailing the common source of title. The authorities sustaining this doctrine are very numerous.¹ The plaintiff having proved that both parties claim from a common source, and that his is the superior title under that source, the defendant must not only show that there is an outstanding title, but he

must connect himself with that title.² It has, however, been held that even where the defendant in ejectment has acknowledged the title of the common source, and for that reason is precluded from questioning its validity at the time of his taking under it, he may avail himself of an outstanding title in a third person, with which he has no connection, where it has accrued subsequently to the time of his recognition of the title of the common source.³

1 See *Finch v. Ullman*, 105 Mo. 255, 24 Am. St. Rep. 383; *Bishop v. Truett*, 85 Ala. 376; *McWhorter v. Heltzell*, 124 Ind. 129; *Luen v. Wilson*, 85 Ky. 503; *Laidley v. Land Co.*, 30 W. Va. 505; *Roosevelt v. Hungate*, 110 Ill. 595; *Lake Erie etc. R. R. Co. v. Whitham*, 155 Ill. 514, 46 Am. St. Rep. 355; *Drake v. Happ*, 92 Mich. 580; *Thompson v. Ellenz*, 58 Minn. 301; *Myrick v. Wells*, 52 Miss. 149; *Beale v. Brown*, 6 Mackey, 574; *Schwallback v. Railway Co.*, 69 Wis. 292, 2 Am. St. Rep. 740; *Reed v. Derryberry*, 3 Tenn. Cas. 725; *Gaines v. New Orleans*, 6 Wall. 642; *Cox v. Hart*, 145 U. S. 376.

2 *Caldwell v. Neely*, 81 N. C. 114; *Christenbury v. King*, 85 N. C. 229; *Matkin v. Marx*, 96 Ala. 501; *Sell v. McAnaw*, 138 Mo. 267; *Bolling v. Teel*, 76 Va. 493; *Burns v. Goff*, 79 Tex. 236; *Gillum v. Case*, 67 Miss. 588; *Doyle v. Wade*, 23 Fla. 90, 11 Am. St. Rep. 334; *Cooke v. Avery*, 147 U. S. 375.

3 *McCready v. Lansdale*, 58 Miss. 877. See, also, *Rice v. Railway Co.*, 87 Tex. 90, 47 Am. St. Rep. 72, and note.

§ 462. Evidence of Title.

As a general rule, the burden is on the plaintiff in ejectment to show that he has a legal title, and the right of possession in the land. He must

make out his title and right of possession by affirmative proof.¹ But it is said that he may safely rest his case upon showing such facts and such evidences of title as would establish his right to recover, if no further testimony were offered.² As already seen in the preceding section, the plaintiff may show that both parties claim from a common source, and need not show a complete chain of title.³ He need not prove title back of such common source.⁴ Having proved title in himself from a common source with that of the defendant he may rest, as against a plea of not guilty, and is entitled to judgment without proving when the defendant took possession, if no further evidence is introduced.⁵ Where both parties do not claim from a common source, a plaintiff in ejectment, in order to make out his case, must ordinarily show a regular chain of title back to some grantor in actual possession, or to the government.⁶ If he fails to show title he cannot recover, although the defendant has no title.⁷ Where the reliance of the plaintiff is exclusively upon a paper title, it is not sufficient to show possession by a grantor at some remote period, but he must have been in possession at or near the time of the execution of the deed by him.⁸ Proof of a deed to a prior grantor in possession of the land, and of a series of conveyances from him to the plaintiff, is held sufficient

evidence of title as against a mere intruder, although the plaintiff attempts to prove a complete chain of title from the government and fails to do so.⁹ A deed absolute in form, but intended as a mortgage to secure a debt, passes no title to the grantee,¹⁰ and hence does not afford such title as will sustain an action of ejectment.¹¹ So no title passes at a sale under a forged mortgage which will uphold an action of ejectment. Such mortgage is absolutely void.¹² A deed from town authorities showing that land was dedicated, but not showing by whom or how, will not support ejectment.¹³ So paper writings, in order that they may constitute a foundation for title or a link in a chain of title, must be executed according to the laws in force at the time of their execution.¹⁴ A tax deed to the plaintiff in ejectment, executed after the commencement of the action, is inadmissible in evidence.¹⁵ The action cannot be supported by a title acquired after its commencement.¹⁶ A deed from one who has neither right, title, interest, nor possession of land, either in his own right, or by virtue of an office as agent, trustee, executor, or administrator, passes no title, and is inadmissible in evidence in an action of ejectment.¹⁷ The payment of taxes is held to be some evidence of title.¹⁸ But payment of taxes is not an act of possession, nor is it evidence of a possessory title.¹⁹ In

ejectment, mere evidence of the payment of taxes is not proof of title in the payor when he has not connected himself with any outstanding title, or shown adverse possession for the time required.²⁰ In Wisconsin, in order to recover in ejectment, where neither the pleadings nor the proof show that the parties derived their titles from a common grantor or show the source of the defendant's title, or that he had ever been in possession of the land, the plaintiff must either connect himself with the government title or with some grantor who was the common source of title to both parties.²¹

1 *Roots v. Beck*, 109 Ind. 472; *Suttle v. Richmond etc. R. R. Co.*, 76 Va. 285; *Richardson v. Baltimore etc. R. R. Co.*, 89 Md. 126; *Kitchen v. Wilson*, 80 N. C. 191; *McMasters v. Torsen* (Sup. Ct., Idaho), 51 Pac. Rep. 100; *Conwell v. Mann*, 100 N. C. 234.

2 *Mobley v. Griffin*, 104 N. C. 112, 115, in which case the various methods of establishing a prima facie showing of title are pointed out. So in *Conwell v. Mann*, 100 N. C. 234. And see *Keith v. Keith*, 104 Ill. 397; *Fisk v. Hopping*, 169 Ill. 105.

3 *Geiger v. Kaigler*, 15 S. C. 262; *Whissenhunt v. Jones*, 78 N. C. 361; *Cave v. Anderson*, 50 S. C. 293.

4 *Florence Bldg. etc. Assn. v. Schall*, 107 Ala. 531.

5 *Dean v. Gorton*, 177 Ill. 624; *South Park Commrs. v. Gavin*, 139 Ill. 280.

6 *Shockley v. Starr*, 119 Ind. 172, 176; *Start v. Clegg*, 83 Ind. 78; *Florence Bldg. etc. Assn. v. Schall*, 107 Ala. 531; *Hull v. Campbell*, 56 Pa. St. 154; *Greenleaf v. Railroad Co.*, 141 N. Y. 395; *Young v. Chamberlain*, 15 La. Ann. 454; *Hubbard v. Godfray*, 100 Tenn. 150; *Florida etc. R. R. Co. v. Loring*, 51 Fed. Rep. 932; *Bonaffon v. Peters*, 134 Pa. St. 180.

7 *Deputy v. Mooney*, 97 Ind. 463.

- 8 Florida etc. Ry. Co. v. Burt, 36 Fla. 497; L'Engle v. Reed, 27 Fla. 345.
- 9 Coombs v. Hertig, 162 Ill. 171.
- 10 See Smith v. Smith, 80 Cal. 323; Murdock v. Clarke, 90 Cal. 427.
- 11 Snyder v. Parker, 19 Wash. 276, 67 Am. St. Rep. 726; Berdell v. Berdell, 33 Hun, 535.
- 12 Finley v. Babb, 144 Mo. 403.
- 13 Hillman v. White (Ky. Ct. App.), 44 S. W. Rep. 111.
- 14 Soloman v. Yrisarri, 9 N. Mex. 480. See Fisk v. Hopping, 169 Ill. 105.
- 15 Dickinson v. Thornton, 65 Ark. 610.
- 16 Percifull v. Platt, 36 Ark. 456; sec. 459, ante.
- 17 Schrack v. Zubler, 34 Pa. St. 38, 40; Ablard v. Fitzgerald, 87 Wis. 516.
- 18 Austin v. King, 97 N. C. 339; Ruffin v. Overby, 105 N. C. 78.
- 19 Reed v. Field, 15 Vt. 672; Tillotson v. Prichard, 60 Vt. 94, 6 Am. St. Rep. 95.
- 20 Bernhardt v. Brown, 122 N. C. 587, 65 Am. St. Rep. 725.
- 21 Slauson v. Transportation Co., 99 Wis. 20.

§ 463. Demand and Notice Prior to Suit.

As a general rule, defendants in ejectment are not entitled to notice to quit, nor is a demand of possession necessary, unless they rest their right of possession upon consent or permission from the plaintiff.¹ In other words, if the relation of landlord and tenant does not in some way exist between the parties, demand and notice before suit is unnecessary.² It is, however, stated as a general principle that where a party acquires the possession of land under an executory contract of purchase, the vendor cannot maintain eject-

ment against him, until he has demanded possession, or given him notice to quit.³ And in some jurisdictions this principle is held to be applicable even in cases where the vendee in possession has failed to pay the purchase money as stipulated.⁴ But the prevailing rule is to the effect that when the purchaser of land has made default in the payment of money under an executory contract, no notice to quit is necessary, nor any demand of the amount due, or of the possession, or tender of a deed, before bringing an action of ejectment.⁵ So, if the vendee repudiates the contract under which he obtained the possession, or in some way, by his own act, has made his rightful possession tortious, the vendor is at liberty to treat the contract as rescinded, and regain possession by an action of ejectment, without either a demand of possession or notice to quit.⁶ It is held to be settled law in New Jersey that if a party be let into possession of land under a contract to purchase, and the purchase be not afterward completed by the vendee, he is not to be regarded as a tenant to the vendor in such sense as to entitle him to three months' notice to quit, but he may be ejected after demand of possession, unless there be in the contract something to the contrary.⁷ In ejectment against a trespasser, notice to quit is not required.⁸ And where a mortgage contains a power of re-entry and sale, the mortgagee may maintain ejectment

against the mortgagor, after default, without notice to quit before action brought.⁹

1 Shackleford v. Smith, 5 Dana, 232; and see Dickey v. Gibson, 121 Cal. 276.

2 Eaton v. George, 3 Jones, 385; McCaslin v. State, 99 Ind. 428.

3 Prentice v. Wilson, 14 Ill. 91; Carson v. Baker, 15 N. C. 220, 25 Am. Dec. 706; Twyman v. Hawley, 24 Gratt. 512. 18 Am. Rep. 661; Jones v. Temple, 87 Va. 210, 24 Am. St. Rep. 649; Gregg v. Von Phul, 1 Wall. 274; and see Morton v. Dickson, 90 Ky. 572, 576.

4 Jones v. Temple, 87 Va. 210, 24 Am. St. Rep. 649; Fears v. Merrill, 9 Ark. 559, 50 Am. Dec. 226; Right v. Beard, 13 East, 210.

5 Hotaling v. Hotaling, 47 Barb. 167; Doe ex dem. Brumfield v. Brown, 7 Blackf. 142, 41 Am. Dec. 217; McClane v. White, 5 Minn. 178; Dean v. Comstock, 32 Ill. 173; Coates v. Cleaves, 92 Cal. 427; Seabury v. Doe, 22 Ala. 207, 58 Am. Dec. 254; Den v. Webster, 10 Yerg. 513; Wright v. Moore, 21 Wend. 230.

6 Prentice v. Wilson, 14 Ill. 91; Bedford v. Thomas, 6 B. Mon. 332; Love v. Edmonston, 1 Ired. 152; Harle v. McCoy, 7 J. J. Marsh. 319, 23 Am. Dec. 407.

7 Ross v. Van Aulen, 42 N. J. L. 49.

8 Meeker v. Doe, 7 Blackf. 169.

9 Carroll v. Ballance, 26 Ill. 9, 79 Am. Dec. 354; Pierce v. Brown, 24 Vt. 165; Fuller v. Wadsworth, 24 N. C. 263, 38 Am. Dec. 692; Doe v. Olley, 12 Ad. & E. 481.

§ 464. Who may Maintain Ejectment.

Generally, in the statutory action in the nature of ejectment, it is not necessary that the party seeking to recover should be the owner in fee of the land in controversy. Anyone having a subsisting interest in real estate, and a right to the possession thereof may, as a general rule, recover

the same by such an action.¹ Corporations, sole or aggregate, may maintain actions to recover the possession of real property which they have the capacity to purchase and hold.² So, by comity, a corporation may maintain ejectment in a state other than that which granted the charter.³ A municipal corporation may maintain ejectment to recover possession of streets which it owns, and is entitled to possess.⁴ So a municipality, though charged with no right or duty respecting lands dedicated to public uses, is yet entitled, as the representative of the public in which the right of possession inheres, to gain possession of such lands in an action of ejectment.⁵ And this is held to be so, whether the municipality owns the fee, or the adjoining proprietor retains it;⁶ and the action may be maintained to recover possession even as against the owner of the fee.⁷ A state, as a political corporation, may maintain, in its corporate name and in its own courts, actions for the enforcement of its rights or the redress of its wrongs, including, in proper cases, actions of ejectment.⁸ And it has been held that the state may maintain ejectment for a wharf constructed without authority beyond low-water mark.⁹ Generally, in this country, an incorporated religious society holds its property, like a civil corporation, subject to the general principles of law applicable to such corporations, as administered by civil courts, and

may maintain actions in the corporate name for the protection or recovery of property belonging to the society.¹⁰ The title to the property of a divided church is in that part of the organization which is acting in harmony with its own law.¹¹ The seceding members lose all right to the property of the corporate body, although they constitute a majority, and in such case the remaining members retain its ownership, control, and management.¹² But it was held in Missouri that a minority of members of a local missionary Baptist church could not elect themselves trustees and maintain ejectment for the church property, although such minority alone, of the entire membership, truly adhered to the rules, usages, and faith of the missionary Baptist churches of Missouri.¹³ It has been held that an Indian, in whom title to land has vested by virtue of compliance with a treaty provision, and who has been afterward dispossessed, may recover possession in an ejectment suit.¹⁴ But a body or tribe of Indians has no corporate name by which it can institute a suit in ejectment.¹⁵

1 Vance v. Schroyer, 82 Ind. 114. See sec. 472, post.

2 Martin v. Branch Bank, 15 Ala. 587, 50 Am. Dec. 147; Henley v. Branch Bank, 16 Ala. 552; Santillan v. Moses, 1 Cal. 92.

3 New York Dry Dock v. Hicks, 5 McLean, 111. Compare Leasure v. Insurance Co., 91 Pa. St. 491.

4 San Francisco v. Sullivan, 50 Cal. 603; Mayor etc. v. Steamboat Co., Charlt. (Ga.) 342; Racine v. Crosten-

berg, 61 Wis. 481, 50 Am. Rep. 149; California v. Howard, 78 Mo. 88.

5 Price v. Plainfield, 40 N. J. L. 608; Weger v. Delran, 61 N. J. L. 224.

6 Visalia v. Jacob, 65 Cal. 434, 52 Am. Rep. 303; Southern Pac. Co. v. Burr, 86 Cal. 283; San Francisco v. Grote, 120 Cal. 50, 65 Am. St. Rep. 155. Contra, West Covington v. Freking, 8 Bush, 121; Racine v. Crostenberg, 61 Wis. 481, 50 Am. Rep. 149.

7 Eureka v. Gates, 120 Cal. 54. See sec. 457, ante.

8 James River etc. Co. v. Thompson, 3 Gratt. 270; Brown v. State, 5 Colo. 496; State v. Grant, 10 Minn. 39; People v. Trinity Church, 22 N. Y. 44.

9 Coburn v. Ames, 52 Cal. 385, 28 Am. Rep. 634; and see Concord Co. v. Robertson, 66 N. H. 19.

10 See Calkins v. Cheney, 92 Ill. 463; Sale v. First Baptist Church, 62 Iowa, 26, 40 Am. Rep. 136; Watson v. Jones, 13 Wall. 679.

11 White Lick etc. Meeting v. White Lick etc. Meeting, 89 Ind. 136; Schnoor's Appeal, 67 Pa. St. 138 5 Am. Rep. 415; Rosh's Appeal, 69 Pa. St. 462, 8 Am. Rep. 275.

12 Goff v. Greer, 88 Ind. 122, 45 Am. Rep. 449; and see Baker v. Ducker, 79 Cal. 365; Finley v. Brent, 87 Va. 103.

13 Turpin v. Bagby, 138 Mo. 7.

14 Coleman v. Doe, 4 Smedes & M. 40.

15 Montauk Tribe v. Railway Co., 51 N. Y. Supp. 142; 28 App. Div. 470; Seneca Nation v. Christie, 126 N. Y. 122; Strong v. Waterman, 11 Paige, 607.

§ 465. Same—By Heir, Devisee, or Personal Representative.

An heir may institute and maintain an action of ejectment to recover possession of lands of which his ancestor died seised against any and all persons except the administrator of the estate, and such as have a right or rights thereto

derived from the administrator.¹ And it has been held that although the ancestor died out of possession his heirs may maintain ejectment for the land.² And, also, that pretermitted heirs may maintain ejectment for their inheritance.³ And a patent certificate issued to the ancestor is sufficient to enable the heir to maintain ejectment.⁴ In California, the heirs may themselves, or jointly with the executor or administrator, maintain an action for the possession of real estate;⁵ and such an action by the heir alone may be sustained.⁶ Until dower is legally assigned, the person entitled to the fee may maintain ejectment against one wrongfully in possession, and recover in the action.⁷ But it was held that an heir cannot before partition maintain ejectment against a widow in possession of land of which her husband died seised.⁸ The devisee of a freehold interest in land may, at common law, maintain ejectment for the lands devised.⁹ At common law, an executor or administrator, as such, cannot maintain ejectment for lands of which his testator or intestate died seised in fee;¹⁰ otherwise, where the testator or intestate died possessed only of a term for years, or of an estate from year to year.¹¹ So the doctrine has been maintained that executors, when empowered by the will to sell real estate, may maintain ejectment to recover the possession thereof.¹² But in some jurisdictions this doctrine is

denied.¹³ By statute, in many of the states, executors and administrators are given the exclusive right of possession of the lands of the decedent during the settlement of the estate, and in such case they can maintain ejectment, or a real action in the nature of ejectment, while such right continues.¹⁴

1 Lewon v. Heath, 53 Neb. 707; Gossage v. Mining Co., 14 Nev. 158; Updegraff v. Trask, 18 Cal. 458; Chapman v. Hollister, 42 Cal. 464; Root v. McFerrin, 37 Miss. 17, 55 Am. Dec. 49; Tapscott v. Cobbs, 11 Gratt. 172.

2 Webster v. Webster, 53 Pa. St. 161.

3 McCracken v. McCracken, 67 Mo. 590.

4 McClairen v. Wicker, 8 Ark. 192.

5 Code Civ. Proc., sec. 1452.

6 Crosby v. Dowd, 61 Cal. 557, 600; and see Blythe v. Hinckley, 84 Fed. Rep. 256.

7 King v. Merritt, 67 Mich. 194; and see Moore v. Gilliam, 5 Munf. 346; Brown v. Colson, 41 Ga. 42.

8 Gourley v. Kinley, 66 Pa. St. 270.

9 See Richards v. Pierce, 44 Mich. 444; Lewis v. Lewis, 13 Pa. St. 79, 53 Am. Dec. 443; Matthews v. Turner, 64 Md. 109.

10 Burdyne v. Mackey, 7 Mo. 374; Brown v. Strickland, 32 Me. 174.

11 Duchane v. Goodtitle, 1 Blackf. 117; Mosher v. Yost, 33 Barb. 277; Doe v. Porter, 3 Term Rep. 13.

12 Chew v. Chew, 28 Pa. St. 17; Smathers v. Moody, 112 N. C. 791; Landon v. Townshend, 38 N. Y. St. Rep. 714; 129 N. Y. 166; and see Kirk v. Carr, 54 Pa. St. 285; Bender v. Luckenbach, 162 Pa. St. 18.

13 Rogers v. Marker, 12 Heisk. 645; Cohea v. Jemison, 68 Miss. 510; Fredericks v. Cisco, 72 Md. 393. Compare Smith v. Chase, 90 Hun, 99.

14 See Doyle v. Wade, 23 Fla. 90, 11 Am. St. Rep. 334; Carson v. Dundas, 39 Neb. 503; Lewon v. Heath, 53 Neb. 707; Russell v. Erwin, 41 Ala. 292; Morgan v.

Casey, 73 Ala. 222; Carnall v. Wilson, 21 Ark. 62, 76 Am. Dec. 351; Kline v. Moulton, 11 Mich. 370; Noon v. Finnegan, 32 Minn. 81; Greenleaf v. Allen, 127 Mass. 248; Lamar v. Sheffield, 66 Ga. 710; Higgins' Estate, 15 Mont. 474; Oury v. Duffield, 1 Ariz. Ter. 509; Spotts v. Hanley, 85 Cal. 155. But see contra, Humphreys v. Taylor, 5 Or. 261; Kohn v. M'Kinnon, 90 Fed. Rep. 623.

§ 466. Same—By Mortgagor or Mortgagee.

It is very generally conceded that for most purposes, as against all parties but the mortgagee, the mortgagor of land is the owner and has the whole estate.¹ He may, therefore, maintain ejectment against strangers who have no connection with the title of the mortgagee, for the recovery of the land conveyed by the mortgage;² and the defendant cannot set up in defense of such action the outstanding legal title in the mortgagee, with which he does not connect himself.³ But the prevailing doctrine is, that a mortgagor of land cannot recover in ejectment against the mortgagee in possession, after breach of the condition, or against persons holding possession under the mortgagee.⁴ So in jurisdictions in which a mortgage is regarded as a mere lien, if the mortgagee, with the consent of the mortgagor, after the mortgage debt is due, enters into possession of the property, the mortgagor cannot eject him until the debt is paid. The rule of a mortgagee in possession applies.⁵ And the doctrine is held to be applicable although an action by the mortgagee for the recovery of the debt is barred by the statute of limitations.⁶ So it is

held that where a mortgagee becomes the purchaser of the mortgaged property at a void foreclosure sale, obtains his deed, enters into possession, and then conveys the premises, his grantee, or any successor in interest of the latter, is an assignee of the mortgage debt and mortgage, and considered as a mortgagee in possession, and cannot be ejected by the owner of the fee whose title is subject to such mortgage.⁷ In Pennsylvania, a mortgagor may bring ejectment against a mortgagee in possession, and the action is governed by the same equitable principles which apply in the case of a bill in equity to redeem.⁸ In North Carolina, an equitable title will sustain ejectment,⁹ and proof that the plaintiff in such action is the owner of the equity of redemption in the land will permit a recovery as against a mere trespasser.¹⁰ At common law, the mortgagee of lands is regarded as the owner of the fee;¹¹ and where this doctrine prevails it is held that the mortgagee may maintain ejectment as well before as after default, unless there be an express provision that the mortgagor should retain possession till default in payment.¹² He could clearly maintain ejectment against the mortgagor or those claiming under him, after condition broken, and this without notice to quit or demand of possession,¹³ and without foreclosure or sale,¹⁴ and notwithstanding a statute requires a foreclosure as the first proceeding in the collection of the

debt.¹⁵ So where a debt secured by mortgage is payable in installments, the condition is broken by nonpayment of the first installment, and the mortgagee may thereupon resort to his action of ejectment.¹⁶ In some jurisdictions a mortgage is considered merely in the light of a security for the payment of a debt, and is not a conveyance of title in the land;¹⁷ hence, the mortgagee acquires under the mortgage only a chattel interest in the land, and cannot maintain ejectment for the possession thereof.¹⁸ But, if the mortgagee can make a peaceable entry upon the mortgaged premises after condition broken, he may do so, and may thereafter maintain such possession against the mortgagor and every person claiming under him subsequent to the mortgage, subject to be defeated only by the payment of the debt.¹⁹ In Connecticut, one who has acquired the mortgagor's title can maintain ejectment against the latter, who cannot interpose the mortgagee's outstanding naked legal title as a defense.²⁰ The cestui que trust, in a deed of trust to secure the payment of a debt, cannot maintain ejectment after condition broken.²¹

1 Howard v. Robinson, 5 Cush. 123; Runyan v. Mersereau, 11 Johns. 534, 6 Am. Dec. 393; Emory v. Keighan, 88 Ill. 482; and see sec. 217, ante.

2 Allen v. Kellam, 69 Ala. 442.

3 Allen v. Kellam, 69 Ala. 442; Denby v. Mellgrew, 58 Ala. 147; Scott v. Ware, 65 Ala. 174; Woods v. Hilderbrand, 46 Mo. 284, 2 Am. Rep. 513; Downing v. Sul-

livan, 64 Conn. 1; Dunton v. Keel, 95 Ala. 159; and see sec. 459, ante.

4 Hubbell v. Moulson, 53 N. Y. 225, 13 Am. Rep. 519; Doe v. Tunnell, 1 Houst. 320; Wells v. Rice, 34 Ark. 346; Johnson v. Sandhoff, 30 Minn. 201; Kilgour v. Gockley, 83 Ill. 109; Brobst v. Brock, 10 Wall. 519; Bryan v. Brasius, 162 U. S. 415.

5 Frink v. Le Roy, 49 Cal. 321; Fee v. Swingly, 6 Mont. 596; Cooke v. Cooper, 18 Or. 142, 17 Am. St. Rep. 709; Duke v. Reed, 64 Tex. 705; Rodriguez v. Haynes, 76 Tex. 226; Brinkman v. Jones, 44 Wis. 499, 512; Morse v. Byam, 55 Mich. 594-599.

6 Spect v. Spect, 88 Cal. 437, 22 Am. St. Rep. 314.

7 Cooke v. Cooper, 18 Or. 142, 17 Am. St. Rep. 709; and so, to same effect, Cronor v. Cowdrey, 139 N. Y. 471, 36 Am. St. Rep. 716; Turnan v. Bell, 54 Ark. 273, 26 Am. St. Rep. 35; Townshend v. Thomson, 139 N. Y. 161; Moulton v. Leighton, 33 Fed. Rep. 143.

8 Wells v. Van Dyke, 109 Pa. St. 330; Reitenbaugh v. Ludwick, 31 Pa. St. 131.

9 See Condry v. Cheshire, 88 N. C. 375; sec. 460, ante.

10 Arrington v. Arrington, 114 N. C. 116.

11 Doe v. Grimes, 7 Blackf. 1; sec. 216, ante.

12 Carroll v. Ballance, 26 Ill. 9, 79 Am. Dec. 354; Doe v. Mace, 7 Blackf. 2; Barrett v. Hinckley, 124 Ill. 32, 7 Am. St. Rep. 331. So, by statute, in Maine: Brastow v. Barrett, 82 Me. 456.

13 Colman v. Packard, 16 Mass. 39; Stedman v. Gassett, 18 Vt. 346; Ahern v. White, 39 Md. 409; Bailey v. Winn, 101 Mo. 649; Finlon v. Clark, 118 Ill. 32; Kiser v. Combs, 114 N. C. 640. So, by statute, in Vermont: Ford v. Steele, 54 Vt. 562.

14 Allen v. Ransom, 44 Mo. 263, 266, 100 Am. Dec. 282.

15 Mershon v. Castree, 57 N. J. L. 484.

16 Reddick v. Gressman, 49 Mo. 389; Carroll v. Ballance, 26 Ill. 9, 79 Am. Dec. 354.

17 See sec. 215, ante.

18 Fox v. Wharton, 5 Del. Ch. 200; Carr v. Carr, 52 N. Y. 251; Shattuck v. Bascom, 105 N. Y. 39; Cooke

v. Cooper, 18 Or. 142, 17 Am. St. Rep. 709; Van Vleck v. Enos, 88 Hun, 348; Malloy v. Malloy, 35 Neb. 224-228.

19 Cooke v. Cooper, 18 Or. 142, 17 Am. St. Rep. 709; Rosse v. Johnson, 73 Tex. 608.

20 Downing v. Sullivan, 64 Conn. 1.

21 Siemers v. Schrader, 88 Mo. 20. But see Kennedy v. Fury, 1 Dall. 72; Doggett v. Hart, 5 Fla. 215, 58 Am. Dec. 464; North Hempstead v. Hempstead, 2 Wend. 109.

§ 467. Same—By Tenants in Common.

The doctrine maintained in some jurisdictions is, that one of several tenants in common may recover in ejectment the possession of the entire premises as against all parties but his cotenants.¹ But, in other jurisdictions, this rule has been repudiated, the courts holding that one tenant in common cannot recover in ejectment for the joint benefit of himself and his cotenant, but is entitled to recover only his aliquot share or part.² A tenant in common who is wrongfully evicted by a cotenant may maintain ejectment to recover his undivided share of the land.³ And the commencement of the action is a sufficient demand to be let into possession.⁴

1 Clark v. Lockwood, 21 Cal. 221; Moulton v. McDermott, 80 Cal. 629; Weese v. Barker, 7 Colo. 178; Brady v. Kreuger, 8 S. Dak. 464, 59 Am. St. Rep. 771; Phillips v. Medbury, 7 Conn. 572; Sherin v. Larson, 28 Minn. 523; Yancy v. Greenlee, 90 N. C. 317; Sowers v. Peterson, 59 Tex. 216; Allen v. Higgins, 9 Wash. 446, 43 Am. St. Rep. 847; Brown v. Warren, 16 Nev. 228; and see Webster v. McCarty, 16 Tex. Civ. App. 160.

2 Mobley v. Bruner, 59 Pa. St. 481, 98 Am. Dec. 360; Nye v. Lovitt, 92 Va. 710; Johnson v. Hardy, 43

Neb. 368, 47 Am. St. Rep. 765; Keefe v. Doreland, 18 Mont. 16; King v. Hyatt, 51 Kan. 504, 37 Am. St. Rep. 304.

3 Frakes v. Elliott, 102 Ind. 47; Vance v. Schroyer, 77 Ind. 501; Fenton v. Miller, 116 Mich. 45, 72 Am. St. Rep. 502; Lundy v. Lundy, 131 Ill. 138.

4 Fenton v. Miller, 116 Mich. 45, 72 Am. St. Rep. 502.

§ 468. Same—Miscellaneous.

A purchaser of an equity of redemption, at a sale under execution, has a sufficient legal interest in the land to enable him to recover possession thereof in ejectment against the mortgagor.¹ A landlord may maintain ejectment against his tenant who holds over after the expiration of the term;² or after forfeiture by the tenant by reason of a breach of condition in the lease.³ So lessees in actual possession of land from which they are ousted by an intruder, without title or color of right, may recover possession in ejectment commenced during the continuance of the lease.⁴ It is also held that a lessee, during the continuance of a valid lease, may maintain the action against the lessor, although the owner of the entire fee, less the term.⁵ A tenant by the curtesy may maintain ejectment.⁶ But, at common law, a widow cannot maintain ejectment for her unassigned dower;⁷ nor can she transfer it to a stranger so as to confer on him a right of action for the dower, or enable him to defend against ejectment brought by the administrator

or heirs at law.⁸ The owner of property abutting on a public street or highway may maintain ejectment against anyone who, without right, appropriates the land to his permanent use.⁹ The effect of enabling acts has been such that the wife may now sue the husband in ejectment to recover the possession of her separate property wrongfully detained by him.¹⁰ And it is held that ejectment may be maintained by the board of trustees of a township, in the name of their president, to recover the possession of school lands when wrongfully withheld from them.¹¹ It was held by the supreme court of New York in construing section 2340 of the Code of Civil Procedure, that an action of ejectment in which the plaintiff does not demand any equitable relief, is properly brought in the name of the plaintiff, notwithstanding he is a lunatic of whose person and estate a committee has been appointed. The reason given was that the legal interest in the subject of the action was in the lunatic, and not in his committee.¹²

1 *Black v. Justice*, 86 N. C. 504; and see *Williamson v. Mayer*, 117 Ala. 253.

2 *Moore v. Morrow*, 28 Cal. 551; *Smith v. Littlefield*, 51 N. Y. 539; *Chatard v. O'Donovan*, 80 Ind. 20, 41 Am. Rep. 782; *Hunt v. Wolfe*, 2 Daly, 298.

3 *Kirk v. Mattier*, 140 Mo. 23; *Shaufelter v. Horner*, 81 Md. 621; *Morse v. Clayton*, 13 Smedes & M. 373; and see *Collins v. Hasbrouck*, 56 N. Y. 157, 15 Am. Rep. 407.

4 *Kirsch v. Brigard*, 63 Cal. 319; *Hurst v. Sawyer*, 2 Okla. 470.

5 *Tennessee etc. R. R. Co. v. Railroad Co.*, 75 Ala. 516, 524, 51 Am. Rep. 475; *Henderson v. Ferrell*, 183 Pa. St. 547; *Karns v. Tanner*, 66 Pa. St. 297. Compare *Austin v. Kimball*, 167 Mass. 300; *Horner v. Marietta*, 135 Pa. St. 418.

6 *Doe ex dem. Prescott v. Roe*, 29 Ga. 58; *Wilson v. Arentz*, 70 N. C. 670; *Jackson v. Leek*, 19 Wend. 339.

7 *Jackson v. Vanderheyden*, 17 Johns. 167, 8 Am. Dec. 378; *Shields v. Batts*, 5 J. J. Marsh. 12. Otherwise, by statute, in Michigan: *Burrell v. Bender*, 61 Mich. 608.

8 *Carnall v. Wilson*, 21 Ark. 62, 76 Am. Dec. 351; *Galbraith v. Fleming*, 60 Mich. 408.

9 *Louisville etc. Ry. Co. v. Liebfried*, 92 Ky. 407; *Terre Haute etc. R. R. Co. v. Rodel*, 89 Ind. 128, 46 Am. Rep. 164; and see sec. 464, ante. Compare *Holloway v. Railroad Co.*, 92 Ky. 244.

10 *Wood v. Wood*, 18 Hun, 350; 83 N. Y. 575.

11 *Windham v. Chisholm*, 35 Miss. 531.

12 *Skinner v. Tibbitts*, 13 Civ. Pro. Rep. 370; and see *Patin v. Schoonmaker*, 24 Hun, 85.

§ 469. By Whom not Maintainable.

To recover in ejectment the plaintiff must prove, not only a legal estate in himself, but a present right of possession.¹ In such action, if the plaintiff makes no effort to show that he had either a paper or possessory title to the land, he must fail.² One already in possession of the lands in dispute cannot maintain the action.³ Executors invested with a mere naked power to sell the real estate and distribute the proceeds cannot maintain ejectment.⁴ In Kentucky, the fact that a vendee in possession of land under a title bond has failed to pay the purchase money does not entitle the vendor to maintain eject-

ment.⁵ The action will not lie by a mortgagor against a mortgagee in possession, so long as the mortgage subsists.⁶ And it is held that the assignee of a mortgage cannot recover the premises in ejectment, where he claims to be the owner in fee simple.⁷ Nor can an ordinary receiver maintain ejectment.⁸ And at common law ejectment cannot be maintained against the landlord while the land is in the possession of his tenant.⁹ So a conveyance of lands which are at the time in the adverse possession of a third person, under claim of ownership, without color of title even, while good as between the parties to the conveyance, is void as against the adverse holder, and the grantee cannot recover against him in ejectment, though the grantor, whose deed is free from such infirmity, may maintain such action.¹⁰

1 *George v. McCullough*, 48 Neb. 680; *Wells v. Steckelberg*, 52 Neb. 597, 66 Am. St. Rep. 529; *King v. Coleman*, 98 Tenn. 561; *Austin v. Kimball*, 167 Mass. 300.

2 *Lewis v. Miles* (Ky. Ct. App.), 44 N. W. Rep. 120.

3 *Kribbs v. Downing*, 25 Pa. St. 399; *Taylor v. Crane*, 15 How. Pr. 358; *Carmichael v. Argard*, 52 Wis. 607. Compare *Buchanan v. Hazzard*, 95 Pa. St. 240.

4 *Reynolds v. Boyd*, 92 Ky. 249; and see *Brown v. Strickland*, 32 Me. 174; *Morrill v. Meniffee*, 5 Ark. 629; sec. 465, ante.

5 *Morton v. Dickson*, 90 Ky. 572.

6 *Hubbell v. Moulson*, 53 N. Y. 225, 13 Am. Rep. 519. See sec. 466, ante.

7 *Speer v. Hadduck*, 31 Ill. 439.

8 *Wynn v. Newborough*, 3 Bro. C. C. 88; and see *Green v. Winter*, 1 Johns. Ch. 60; *Moak v. Coats*, 33 Barb. 498.

9 *Dutton v. Warschauer*, 21 Cal. 609; *Banks v. Speers*, 117 Ala. 264; *Grundy v. Hadfield*, 16 R. I. 579.

10 *Stringfellow v. Railroad Co.*, 117 Ala. 250.

§ 470. Against Whom the Action Lies.

Ejectment is a possessory action, and the general rule at common law is, that the action must be brought against the actual occupant or tenant in possession.¹ If the premises are not actually occupied, then the person exercising acts of ownership over, or claiming title to, or some interest in, the premises at the commencement of the suit, is the proper party defendant.² Such is the statutory rule in a number of the states.³ But persons in possession merely as the servants or employés of the party claiming title are not occupants of the land, within the meaning of the ejectment law, and ejectment cannot be maintained against them.⁴ But an exception to this rule exists where the employer is not amenable to process. It is accordingly held that ejectment will lie against an officer of the United States in possession of the demanded premises on behalf of the government.⁵ And when one in the actual possession of property defends his right of possession upon the ground that the government, state or national, has placed him in possession, he must show that the right of the government is

paramount to the right of the plaintiff, or judgment will go against him.⁶ In Michigan, where a mortgage is deemed a mere security, ejectment lies against a purchaser in possession under a void or irregular foreclosure of a mortgage.⁷ The action lies against a municipal corporation to recover the possession of land wrongfully taken.⁸ So the action lies against a railroad company for the possession of its right of way.⁹ So it lies against a telegraph company which has constructed and is maintaining its line upon a public highway without the consent of the owner of the land and without compensating him therefor.¹⁰ An infant may be sued in ejectment.¹¹ So where the husband, by reason of insanity, is confined in a lunatic asylum, and the wife is the active defendant in the cause, withholding the premises sued for, and making a defense of an affirmative character, she must be regarded as a proper party defendant.¹² But, as a general rule, a married woman ought not to be joined with her husband as a party defendant, when he is in possession.¹³ Where husband and wife both live together on premises which have been conveyed to the wife, who paid the consideration out of her own money, the wife is the actual occupant of the property, and the proper party defendant in an action of ejectment in regard to the property. The bare fact of their residing together in the same dwelling does not make the husband either sole or

joint occupant.¹⁴ In ejectment to recover lands which are practically in one body, it is held that the suit can be brought against all of the tenants in possession, although they each severally possess distinct and separate tracts of land.¹⁵ It is, however, held that distinct actions ought to be brought to recover distinct and separate possessions.¹⁶ And that where tenants occupy separate parcels of land under a common landlord, they should be sued separately.¹⁷ Persons should not be made parties defendant in ejectment, against their will, after the commencement of the action, without some satisfactory proof showing that they are proper parties, and especially where they positively deny the facts alleged upon information and belief by the plaintiff seeking to make them parties.¹⁸ Under New York practice, the plaintiff in ejectment may, but is not obliged to, join as parties defendant all those who may be occupants of the premises described.¹⁹

1 *Banyer v. Empie*, 5 Hill, 48; *Morris v. Beebe*, 54 Ala. 300; *Mahoney v. Middleton*, 41 Cal. 41; *Lynch v. Rutland*, 66 Vt. 573; *Banks v. Speers*, 117 Ala. 264; *Grundy v. Hadfield*, 16 R. I. 579, 582; *Danihee v. Hyatt*, 151 N. Y. 493; *Raymond v. Morrison*, 9 Wash. 156.

2 *Taylor v. Crane*, 15 How. Pr. 358, 361; *Chilson v. Buttolph*, 12 Vt. 231; *Abeel v. Van Gelder*, 36 N. Y. 513; *Bell v. Foxen*, 14 Saw. 499.

3 See *Burchard v. Roberts*, 70 Wis. 111, 5 Am. St. Rep. 148; *Converse v. Dunn*, 166 Ill. 25; *Whiteley v. Whiteley*, 110 Mich. 556.

4 *Chiniquy v. Bishop of Chicago*, 41 Ill. 148; *Stewart v. Pace*, 30 Ark. 594; *Hawkins v. Reichert*, 28 Cal. 535;

Morrison v. Holladay, 27 Or. 187; Shaw v. Hill, 83 Mich. 322, 21 Am. St. Rep. 607.

5 Polack v. Mansfield, 44 Cal. 36, 13 Am. Rep. 151; King v. La Grange, 61 Cal. 227, 230; Miller v. Blackett, 47 Fed. Rep. 548; Lee v. Kaufman, 3 Hughes, 98, 137.

6 Scranton v. Wheeler, 113 Mich. 565, 67 Am. St. Rep. 484; Tindal v. Wesley, 167 U. S. 204.

7 Bowen v. Brogan, 119 Mich. 218, 75 Am. St. Rep. 387. But compare Townshend v. Thomas, 139 N. Y. 152; 54 N. Y. St. Rep. 665.

8 Armstrong v. St. Louis, 69 Mo. 309, 33 Am. Rep. 499; McCarty v. Clark County, 101 Mo. 179.

9 Illinois etc. R. R. Co. v. Le Blanc, 74 Miss. 650.

10 Postal etc. Co. v. Eaton, 170 Ill. 513, 62 Am. St. Rep. 390; and see sec. 464, ante.

11 Marshall v. Wing, 50 Me. 62.

12 Bensieck v. Cook, 110 Mo. 173, 33 Am. St. Rep. 422.

13 Rose v. Bell, 38 Barb. 25. Compare Hodson v. Van Fossen, 26 Mich. 68.

14 Martin v. Rector, 101 N. Y. 77; Danihee v. Hyatt, 81 Hun, 238; affirmed, 151 N. Y. 493.

15 Tew v. Henderson, 116 Ala. 545.

16 Fosgate v. Manufacturing Co., 12 N. Y. 585; Walsh v. Varney, 38 Mich. 73.

17 Sutton v. Casseleggi, 77 Mo. 397.

18 Cagger v. Sholtes, 82 Hun, 378.

19 Hennessey v. Paulsen, 147 N. Y. 255.

§ 471. Leave to Appear and Defend.

By statutory provision the right is secured to landlords to appear and defend in the action of ejectment. And the rule is, that every person is considered as a landlord, entitling him to defend, whose title is connected to and consistent with the possession of the occupier.¹ And it is

held that if the landlord is permitted to appear, the tenant cannot interfere with any subsequent proceedings to his prejudice.²

1 *Stiles v. Jackson*, 1 Wend. 316; *Shaver v. McGraw*, 12 Wend. 558; *Williams v. Brunton*, 3 Gilm. 600, 620; *Stribling v. Prettyman*, 57 Ill. 371; and see *Mitchell v. Baratta*, 17 Gratt. 445, 455; *Fitch v. Cornell*, 1 Saw. 156; *Dimick v. Deringer*, 32 Cal. 488; *Hill v. Atterbury*, 88 Mo. 114.

2 *Valentine v. Mahoney*, 37 Cal. 394.

§ 472. Pleadings—Complaint.

In an action of ejectment at common law, a fictitious personage was the nominal plaintiff, claiming by lease the estate in dispute, and the real holder of the legal title occupied the character of a lessor of the plaintiff.¹ To maintain the action, it was necessary for the plaintiff in case of contest to establish four points, namely, title in his lessor, a lease for the present term, that the lessee entered in pursuance of said lease, and that the defendant ousted or ejected him.² The fictitious proceedings in ejectment have been abolished by statute, and do not prevail in modern practice. The action is required to be brought by the real claimant against the real defendant, and the procedure is so modified as to present but two questions, namely, title and the right of possession. Such is the prevailing rule under code practice.³ Under this practice none of the technical allegations peculiar to the old action of ejectment are necessary. In general terms, the

only facts necessary to be alleged are, that the plaintiff is seised of the premises, or of some estate therein in fee, or for life, or for years, according to the fact, and that the defendant was in their possession at the commencement of the action, and withholds the possession from the plaintiff.⁴ The complaint should aver seisin or right of possession at the time of the commencement of the action, and it is held insufficient to aver it merely as of the date of the alleged ouster.⁵ A complaint in ejectment alleging that the plaintiff, at a date named, was the owner and seised and possessed of certain premises, and that the defendant has unlawfully entered on the second story thereof and ousted and ejected the plaintiff therefrom, and has ever since withheld the possession thereof from him, is held sufficient.⁶ But a complaint in ejectment which sets up mere matters of evidence, not containing any statement of seisin, or ownership, or right of possession on the part of the plaintiff, is fatally defective.⁷ Only the ultimate facts constituting the cause of action should be set out in the complaint.⁸ Allegations that the defendant's possession is "unlawful," and the plaintiff's title is "lawful," are unnecessary.⁹ Nor is it necessary to set out the residence of the parties.¹⁰ But the averment that the defendant "unjustly withholds" the premises is not equivalent to the allegation that he "unlawfully withholds" them, as required by

the statute of New Mexico.¹¹ An allegation that the plaintiff "is the owner" of the land is in substance an allegation of seisin in fee.¹² And the averment of seisin in fee is equivalent to an averment of the right to immediate possession, and, therefore, the defendant's possession and withholding are necessarily wrongful, and an allegation to that effect is unnecessary.¹³ A complaint which, by the facts averred, shows title in the plaintiff, without stating the conclusion that he is the owner, is held good on demurrer.¹⁴ It is held that the complaint need not state the exact time of the alleged ouster;¹⁵ the date of the ouster being material only in respect to mesne profits.¹⁶ And a complaint, otherwise sufficient, is not changed in character by alleging that the entry and ouster were made willfully, fraudulently, maliciously, and forcibly.¹⁷ In ejectment between tenants in common, a complaint averring that the defendant is in possession of the common property, and the whole thereof, withholds the possession of the whole thereof from the plaintiff, and excludes him from the same, sufficiently alleges an ouster.¹⁸ An ouster may be admitted by the pleadings.¹⁹ The title of the plaintiff may be averred in general terms.²⁰ But if the plaintiff attempts to set forth a specific deraignment, he must aver every fact required to be proved in order to recover.²¹ Allegation of possession at the time of the ouster complained of is held a

sufficient allegation of title.²² Ejectment cannot be maintained upon a mere equitable title.²³ But under the reformed system of procedure, a plaintiff may allege and prove the facts showing himself the equitable owner of land, and thereupon recover the possession as against the holder of the naked legal title, or a stranger. He must, however, exhibit by his complaint the nature of his title, and must plead the facts showing his equitable title.²⁴ He will not be permitted, under a complaint distinctly alleging a strictly legal title as owner in fee, to prove and recover upon an equitable title.²⁵ It is held error to deny the plaintiff in ejectment the right to amend his complaint upon the trial by setting forth the estate claimed.²⁶ Under a declaration claiming an entire fee, he may amend alleging an undivided one-half interest.²⁷ So he may be allowed to amend his complaint so as to show that the land in controversy is community property.²⁸

1 See *Den v. Morris*, 7 N. J. L. 6, 11 Am. Dec. 508; *Newman's Pleading and Practice*, 86.

2 See 3 *Blackstone's Commentaries*, 202; *Dale v. Hunneman*, 12 Neb. 223.

3 See *Malloy v. Malloy*, 35 Neb. 224; *Holland v. Challen*, 110 U. S. 15.

4 *Payne v. Treadwell*, 16 Cal. 220; *Caperton v. Schmidt*, 26 Cal. 479, 85 Am. Dec. 187; and so, to same effect, *Lewis v. Railway Co.*, 5 S. Dak. 148; *First Nat. Bank v. Roberts*, 9 Mont. 323; *Rawson v. Taylor*, 57 Me. 343; *Mitchell v. Campbell*, 19 Or. 198; *Shaw v. Tracy*, 95 Mo. 531; *Rhodes v. Higbee*, 21 Colo. 88; *Vance v. Schroyer*, 82 Ind. 114.

5 *Vance v. Anderson*, 113 Cal. 532, disapproving *Kidder v. Stevens*, 60 Cal. 420; *Simmons v. Lindley*, 108 Ind. 297.

6 *Brady v. Kreuger*, 8 S. Dak. 464, 59 Am. St. Rep. 771. See, also, *Rhodes v. Higbee*, 21 Colo. 88; *Balch v. Smith*, 4 Wash. 497; *Belles v. Miller*, 10 Wash. 259.

7 *McCaughey v. Schuette*, 117 Cal. 223, 59 Am. St. Rep. 176.

8 *McCaughey v. Schuette*, 117 Cal. 223, 59 Am. St. Rep. 176; *Depuy v. Williams*, 26 Cal. 309.

9 *Sanders v. Leavy*, 16 How. Pr. 308; *Payne v. Treadwell*, 16 Cal. 220; and see *Hildreth v. White*, 60 Cal. 549.

10 *Doll v. Feller*, 16 Cal. 433.

11 *Osborne v. United States*, 3 N. Mex. 213. Compare *Marshall v. Shafter*, 32 Cal. 176.

12 *Garwood v. Hastings*, 38 Cal. 216; and see *Steeple v. Downing*, 60 Ind. 478; *Schenck v. Kelley*, 88 Ind. 444.

13 *Halsey v. Gerdes*, 17 Abb. N. C. 395, disapproving *Moore v. Lehman*, 20 Jones & S. 283.

14 *Lovely v. Speisshoffer*, 85 Ind. 454.

15 *Collier v. Corbett*, 15 Cal. 183; and see *Woodward v. Brown*, 13 Pet. 1; *Cole v. Segraves*, 88 Cal. 103.

16 *Stark v. Barrett*, 15 Cal. 361.

17 *Hildreth v. White*, 66 Cal. 549.

18 *Rego v. Van Pelt*, 65 Cal. 254. See, also, as to sufficiency of allegation of ouster, *Hihn v. Mangenberg*, 89 Cal. 270; *Jones v. Memmott*, 7 Utah, 343.

19 *Carpenter v. Carpenter*, 119 Mich. 167.

20 *Hutchinson v. McNally*, 85 Cal. 619.

21 *Castro v. Richardson*, 18 Cal. 478.

22 *Winans v. Christy*, 4 Cal. 76, 60 Am. Dec. 597; *Swaynie v. Vess*, 91 Ind. 584; *Myers v. Jackson*, 135 Ind. 136.

23 *Peck v. Newton*, 46 Barb. 173; *San Felipe etc. Co. v. Belshaw*, 49 Cal. 655; sec. 459, ante.

24 *Merrill v. Dearing*, 47 Minn. 137; *Hoppough v. Struble*, 60 N. Y. 430.

25 *Merrill v. Dearing*, 47 Minn. 137.

26 Ludeman v. Hirth, 96 Mich. 17, 35 Am. St. Rep. 588.

27 Retan v. Sherwood, 120 Mich. 496.

28 Owen v. Railway Co., 12 Wash. 313.

§ 473. Same—Description of Premises.

In California, the land must be described in the complaint with such certainty as to enable an officer, upon execution, to identify it.¹ So in Montana the complaint should describe the land with such certainty and definiteness as to enable an officer to identify the land from the description itself, without resort to other sources of information.² And it is held that unless the description is such, the complaint will be so fatally defective as not to support a judgment, nor can such defect be cured by amendment after judgment.³ If the description be such as would enable a competent surveyor to locate the land by referring to deeds, writings, or known objects, by which the exact land can be identified, it is held sufficient.⁴ A description of the property by metes and bounds of a certain section is held to be sufficiently definite and certain, without alleging how the corners are marked.⁵ A particular description of the land by courses and distances must control the general description in the same complaint when the two are in conflict.⁶ In case of conflict between the natural boundary, or shore line, and the line as given by courses and distances, the former must control.⁷ The description of the

land in the complaint by a certain name is sufficient if it can be rendered certain by evidence.⁸ But it is held that a description contained in a copy of a deed, filed with the complaint as an exhibit, but which deed is not the foundation of the action, cannot be looked to in aid of the allegations of the complaint.⁹ It is said that mathematical accuracy in describing the lands sought to be recovered is not indispensable, and that descriptions are not to be rejected because they are awkwardly and inaptly expressed. If, taking the language in the connection in which it is used, the meaning is reasonably clear to the ordinary apprehension, the description is sufficient.¹⁰ But a complaint not containing a sufficient description of the property is clearly bad.¹¹ So of a complaint giving a description which embraces nothing whatever.¹² The description should designate the county and state in which the land is situated.¹³ But a complaint in ejectment is not objectionable on the ground of want of jurisdiction by reason of not alleging that the demanded premises are in the county, if it shows that they are situated in a certain town which is the county seat.¹⁴

1 Cal. Code Civ. Proc., sec. 455. See, also, under the Utah statute: *Darger v. Le Sieur*, 9 Utah, 192.

2 *Tracy v. Harmon*, 17 Mont. 465.

3 *Tracy v. Harmon*, 17 Mont. 465; *Haggin v. Lorenz*, 15 Mont. 309. See *Campe v. Renandine*, 64 Miss. 441, defect in description cured by defendant's plea.

4 *Lane v. Abbott*, 23 Neb. 489; *Buesing v. Forbes*, 33 Fla. 495; *Ayers v. Reidel*, 84 Wis. 276; *Hihn v. Mangenberg*, 89 Cal. 268.

5 *Mills v. Traver*, 35 Neb. 292.

6 *Haggin v. Lorenz*, 15 Mont. 309.

7 *Railway Co. v. Jordan*, 87 Cal. 23.

8 *Stanley v. Green*, 12 Cal. 148; *Hildreth v. White*, 66 Cal. 549; and see *Haley v. Amestoy*, 44 Cal. 132; *Mettarh v. Allen*, 139 Ind. 644.

9 *Liggett v. Lozier*, 133 Ind. 451.

10 *Winslow v. Cooper*, 104 Ill. 235. See, also, *Hitchcox v. Rawson*, 14 Gratt. 526; *Livingston County v. Morris*, 71 Mo. 603; *Speight v. Jenkins*, 99 N. C. 143; *Wade v. Doyle*, 18 Fla. 630; *Sphung v. Moore*, 120 Ind. 352.

11 *Tracy v. Harmon*, 17 Mont. 465; *Liggett v. Lozier*, 133 Ind. 451; *Lazar v. Caston*, 67 Miss. 275; *Ramsey v. O'Leary*, 61 Me. 366.

12 *Budd v. Bingham*, 18 Barb. 494; *Twogood v. Hoyt*, 42 Mich. 609.

13 *Leary v. Langsdale*, 35 Ind. 74; *Minkhart v. Hankler*, 19 Ill. 47.

14 *Cole v. Segraves*, 88 Cal. 103; *Martin v. Martin*, 51 Me. 366.

§ 474. Same—Joinder of Causes.

The plaintiff in ejectment is not bound to bring a separate action against several trespassers on his single, separate, and distinct tenement or parcel of land.¹ But he will not be allowed to join in one suit several and distinct parcels, tenements, or tracts of land, in possession of several defendants, each claiming for himself.² Under California practice, a complaint in ejectment may include separate and distinct parcels of land, but the several causes of action must be separately stated, affect all the parties to the action, and not

require different places of trial.³ Several actions of ejectment for separate pieces of property brought in the same court by the plaintiff against the same defendant may be consolidated by order of the court.⁴

1 Greer v. Mezes, 24 How. 277; Camden v. Haskill, 3 Rand. 462; and see Jackson v. Woods, 5 Johns. 278; Jackson v. Andrews, 7 Wend. 152, 22 Am. Dec. 574.

2 Id.; Walsh v. Varney, 38 Mich. 73; Bell v. Foxen, 14 Saw. 499; 42 Fed. Rep. 755.

3 Boles v. Cohen, 15 Cal. 151; and see Beard v. Federy, 3 Wall. 478.

4 Smith v. Smith, 80 Cal. 323; and so, to same effect, Den ex dem. Smith v. Fen, 9 N. J. L. 335.

§ 475. Pleading on Part of Defendant.

At common law, the defendant in ejectment was permitted to make defense upon the terms that he entered into the "consent rule," and pleaded the general issue or plea of "not guilty."¹ And in this particular respect no material change has been effected through the enactment of statutes dispensing with the fictions which pertained to the common-law action of ejectment. Under such statutes, as well as at common law, the defendant in ejectment may, under the general issue, give in evidence any lawful defense to the action.² Such plea of general issue admits the defendant to be in possession of all the land not specially disclaimed.³ In an action for the recovery of real property under reformed or code procedure, it is sufficient, as a general rule, for the

defendant to deny generally the title alleged in the complaint or petition, and, under such a denial, he may prove any fact tending to show that the plaintiff has not the title, or the right of possession.⁴ A general denial is sufficient to let in any legal defense.⁵ In Kansas practice, the defendant may show, under a general denial, a paramount title in himself, provided such title carries with it the right of possession, whether such title is legal or equitable, and whether the plaintiff's title is legal or equitable.⁶ Under a statute requiring the defendant in ejectment to plead the estate or license under which he holds possession, an answer by way of general denial creates no issue under which evidence of his title is admissible, and, if the plaintiff pleads and proves any legal title to the premises, he thereby establishes a *prima facie* case.⁷ So, generally, although in ejectment title in the defendant is involved in his denial of the plaintiff's right, yet, if he wishes to avail himself of facts not amounting to such denial, he must plead them.⁸ A denial in the defendant's answer of all right, title, and interest in the plaintiff is generally deemed by the courts an admission that his own possession is adverse, and may, therefore, be treated as a confession of ouster, superseding the necessity of proof upon the trial.⁹ An answer setting up title to only a portion of the demanded premises must particularly describe the part to which title is claimed.¹⁰ Where the

plaintiff alleges that he is the owner in fee simple, an answer which avers that he has only an estate for years is sufficient, as proof of the latter will not support an averment of the former.¹¹ If the defendant has, in fact, no interest in the premises, he should set up a disclaimer in his answer, and this he may usually do in connection with other defenses.¹² But it has been held that the defendant cannot interpose the general issue "not guilty," and also enter a disclaimer. These defenses are said to be incompatible, and that one must overrule the other.¹³

1 See *Gallagher v. McNutt*, 3 Serg. & R. 409; *Bratton v. Mitchell*, 5 Watts, 69.

2 See *Hutte v. Thornton*, 44 Miss. 166; *Bernard v. Elder*, 50 Miss. 336; *Gosser v. Hickenlooper*, 81* Pa. St. 281; *Sheldon v. Van Vleck*, 106 Ill. 45; *Roosevelt v. Hungate*, 110 Ill. 595; *Reynolds v. Cook*, 83 Va. 817, 5 Am. St. Rep. 317; *Elizabethport Cord Co. v. Whitlock*, 37 Fla. 221; *Barco v. Fennell*, 24 Fla. 378.

3 *Perkins v. Raitt*, 43 Me. 280; *Coffin v. Freeman*, 82 Me. 577.

4 *Stout v. Hyatt*, 13 Kan. 233; *Wicks v. Smith*, 18 Kan. 508; *Gilman v. Gilman*, 111 N. Y. 265; *Sparrow v. Rhoades*, 76 Cal. 208, 9 Am. St. Rep. 197; *Marshall v. Shafter*, 32 Cal. 176.

5 *Iba v. Central Assn.*, 5 Wyo. 355; *Powers v. Armstrong*, 36 Ohio St. 857.

6 *Clayton v. School District*, 20 Kan. 256.

7 *Allen v. Higgins*, 9 Wash. 446, 43 Am. St. Rep. 847.

8 *Nelson v. Brodhack*, 44 Mo. 596, 100 Am. Dec. 328. See, also, *Ford v. Sampson*, 17 How. Pr. 447, 30 Barb. 183; *Wade v. Doyle*, 17 Fla. 522; *Wicks v. Smith*, 18 Kan. 508; *Luen v. Wilson*, 85 Ky. 503; *Sharp v. Daugney*, 33 Cal. 505.

9 Clason v. Rankin, 1 Duer, 337; Harrison v. Taylor, 33 Mo. 211, 82 Am. Dec. 159; Greer v. Tripp, 56 Cal. 209; Gilchrist v. Middleton, 107 N. C. 663; McCallum v. Boswell, 15 U. C. Q. B. 343.

10 Anderson v. Fisk, 36 Cal. 625; Hemenway v. Francis, 20 Or. 455.

11 Hunt v. Campbell, 83 Ind. 48.

12 See Stimmets v. Logan, 3 Watts, 160; Kirkland v. Thompson, 51 Pa. St. 216.

13 Bernstein v. Humes, 60 Ala. 582, 31 Am. Rep. 52.

§ 476. Equitable Defenses.

By the rule of the common law, all defenses in ejectment are excluded, except those which are legal. Neither equitable titles nor equitable defenses can avail either as a basis of recovery or of defense.¹ And the strict legal title prevails in ejectment in the federal courts. The plaintiff must stand or fall on his own legal title.² In many of the states equitable defenses in ejectment are now allowed by statute, and the defendant may, by answer, interpose an equitable defense, and his equities may be tried and determined directly in that action, without resort to an independent suit in equity.³ But it is held that the defendant must set up and allege his equities in his answer so fully and completely that a court of equity would, under the old practice, have granted him adequate relief and have confirmed his right of possession as against the holder of the adverse legal title.⁴ Where the answer prays affirmative relief, the action is converted into a cause in equity and is triable on the chancery side

of the court.⁵ Equitable estoppels are proper defenses in ejectment, and are held to be admissible under the plea of not guilty.⁶ But, as a general rule, an estoppel in pais, to be available as a defense, must be specially pleaded.⁷ Any conduct which estops one in pais to assert title or right of possession to the land is held to be a good defense in ejectment.⁸ But it is settled law in Illinois that estoppels in pais, affecting permanent interests in land, cannot be rendered efficacious as a means of defense in an action of ejectment.⁹

1 *McKay v. Williams*, 67 Mich. 547, 553, 11 Am. St. Rep. 597; *Shaw v. Hill*, 83 Mich. 322, 21 Am. St. Rep. 607; *Kirkpatrick v. Clark*, 132 Ill. 342, 22 Am. St. Rep. 531; and see sec. 460, ante.

2 *Stone v. Perkins*, 85 Fed. Rep. 616; *Schoolfield v. Rhodes*, 82 Fed. Rep. 153; *Langdon v. Sherwood*, 124 U. S. 74; *Scott v. Neely*, 140 U. S. 106.

3 *Clyburn v. McLaughlin*, 106 Mo. 521, 27 Am. St. Rep. 369; and see *Swon v. Stevens*, 143 Mo. 384; *Merrill v. Dearing*, 47 Minn. 137; *Hyde v. Mangan*, 88 Cal. 319; *Spaur v. McBee*, 19 Or. 76; *Warren v. Crew*, 22 Iowa, 315; *Adams County v. Graves*, 75 Iowa, 642.

4 *Williams v. Murphy*, 21 Minn. 534; *Freeman v. Brewster*, 70 Minn. 203; and see *Johnson v. Drew*, 34 Fla. 130, 43 Am. St. Rep. 172.

5 *Allen v. Logan*, 96 Mo. 591; *Swon v. Stevens*, 143 Mo. 384.

6 *Hagan v. Ellis*, 39 Fla. 463, 63 Am. St. Rep. 167; *Kirk v. Hamilton*, 102 U. S. 68; and see *Allen v. Seawell*, 70 Fed. Rep. 561; 17 C. C. A. 217; *Wood v. Jackson*, 8 Wend. 9, 22 Am. Dec. 603; *Ford v. Steele*, 31 Neb. 521.

7 *Bray v. Marshall*, 75 Mo. 327; *Central Nat. Bank v. Doran*, 109 Mo. 40; *De Votie v. McGerr*, 15 Colo. 467, 22 Am. St. Rep. 420. But see *Towne v. Sparks*, 23 Neb. 142.

8 *Berry v. Seawall*, 65 Fed. Rep. 742; 13 C. C. A. 101.

9 *Baltimore etc. R. R. Co. v. Illinois Cent. R. R. Co.*, 137 Ill. 9; *Wright v. Stice*, 173 Ill. 571; *Linnertz v. Dorway*, 175 Ill. 508, 67 Am. St. Rep. 232.

§ 477. Outstanding Title.

The plaintiff in ejectment must recover on the strength of his own title, and if it appear that the legal title is in another, whether that other be the defendant, or some third person, it is sufficient to defeat the action.¹ And this defense is held to be available without special plea.² But the outstanding title must be present, subsisting, operative, and available.³ It must be one which, *prima facie*, can be asserted in favor of the party holding it, and not one which is dead under the statute of limitations, or presumptively has been abandoned or extinguished.⁴ But it is held that the action is defeated by the existence of a deed executed and delivered by the plaintiff, by which, upon its face, he grants to the defendant the premises in suit, although he claims that such was not the agreement of the parties and that they did not intend the deed to have that effect.⁵ So the action may be defeated by showing that the defendant is in possession as lessee under a title not in the plaintiff.⁶ A defendant in ejectment, who is in possession of the land under a land contract requiring him to pay all taxes on the land, is estopped to set up title in a third

party acquired at a tax sale upon defendant's default in the payment of the taxes.⁷

1 *Reusens v. Lawson*, 91 Va. 226; *Parkersburg Industrial Co. v. Schultz*, 43 W. Va. 470; *Cronan v. Cochran*, 27 Ia. Ann. 120; *Rowson v. Barbe*, 51 La. Ann. 347.

2 *Bleidorn v. Pilot Mt. Co.*, 89 Tenn. 166; *Woods v. Bonner*, 89 Tenn. 411.

3 *Howard v. Massengale*, 13 Lea, 577; *Reusens v. Lawson*, 91 Va. 226.

4 *Jackson v. Hudson*, 3 Johns. 386, 3 Am. Dec. 500; *Peck v. Carmichael*, 9 Yerg. 325; *Sanitary Dist. v. Allen*, 178 Ill. 330; *Rigney v. Plaster*, 88 Fed. Rep. 686; *Totten v. James*, 55 Mo. 494; *Allen v. McKay*, 120 Cal. 332.

5 *Hall v. La France Fire Engine Co.*, 158 N. Y. 570.

6 *Wagener v. Parrott*, 51 S. C. 489, 64 Am. St. Rep. 695.

7 *Hubbard v. Shepard*, 117 Mich. 25, 72 Am. St. Rep. 548.

§ 478. Defenses—Miscellaneous.

In general terms, the defendant in ejectment may show that the deed offered by the plaintiff was fraudulent and void, and may introduce any evidence tending to estop or conclude the plaintiff from setting up his title, or that will show the defendant entitled to possession.¹ He may allege and prove as matter of defense that the deed under which the plaintiff claims, though absolute on its face, was in fact a mortgage.² He may successfully plead title acquired by adverse possession, fully matured after warrant and survey, but before patent issued to the warrantee, or those claiming under him, whether a patent has

been subsequently granted or not.³ The facts of homestead may be set up as a defense to ejectment based on a sheriff's deed of the premises.⁴ So the illegality of an assessment for a street improvement is a good defense to ejectment brought by a purchaser at a sale for the nonpayment thereof.⁵ So abandonment and nonuser may be set up in bar of a city's action of ejectment to recover its rights in a public alley, where it has permitted the adjoining owner to occupy it adversely for a period of twenty years or more, without making any effort to regain possession, or to assert any right to the property.⁶ The statute of limitations as a defense to an action of ejectment must be specially pleaded, otherwise the defense is waived.⁷ Such is the familiar general rule whenever it is sought to make this defense available.⁸ If, in a joint action of ejectment, one of the plaintiffs is barred by limitation and cannot recover, neither can his coplaintiff recover. Such is the rule where it has not been changed by statutes regulating the practice in such cases.⁹ In some jurisdictions, the defense of the statute of limitations may be shown under a general denial in ejectment.¹⁰ Under the Mississippi code, a defendant in ejectment is not allowed to plead the statute of limitations specially.¹¹ Nor are special pleas of the statute allowable in Florida practice.¹²

1 *Mather v. Hutchinson*, 25 Wis. 27; *Jackson v. Ogden*, 4 Johns. 140; *Torrey v. Beardsley*, 4 Wash. C. C. 242; and see sec. 475, ante.

2 *Dobbs v. Kellogg*, 53 Wis. 448.

3 *Patten v. Scott*, 118 Pa. St. 115, 4 Am. St. Rep. 576. Acquisition of title by adverse possession: See *Barrell v. Title Guarantee Co.*, 27 Or. 77; *Davis v. Coblens*, 12 App. Cas. D. C. 51.

4 *Williams v. Young*, 17 Cal. 403; and see *McDonald v. Badger*, 23 Cal. 400, 83 Am. Dec. 128; *Deffeliz v. Pico*, 46 Cal. 292; *Holden v. Andrews*, 38 Cal. 119.

5 *Stebbins v. Kay*, 123 N. Y. 31; *Schulz v. Albany*, 27 Misc. Rep. 53; 57 N. Y. Supp. 963.

6 *Carlinville v. Castle*, 177 Ill. 105, 69 Am. St. Rep. 212; *Jordan v. Chenoa*, 166 Ill. 530. That abandonment should be specially pleaded, see *St. John v. Kidd*, 26 Cal. 266; *Moon v. Rollins*, 36 Cal. 333, 95 Am. Dec. 181; *Root v. Ball*, 4 McLean, 177.

7 *American Co. v. Bradford*, 27 Cal. 360; *Chivington v. Colorado Springs*, 9 Colo. 597; *Hausee v. Mead*, 27 Hun, 162; *Luen v. Wilson*, 85 Ky. 503.

8 *Smith v. Hutchinson*, 78 Va. 683; *Curtiss v. Life Ins. Co.*, 90 Cal. 245, 25 Am. St. Rep. 114.

9 *Morris v. Wheat*, 8 App. Cas. D. C. 379, 385; *Davis v. Coblens*, 12 App. Cas. D. C. 51; affirmed, 174 U. S. 719; *Marsteller v. McClean*, 7 Cranch, 156; and see *May v. Slade*, 24 Tex. 205; *Waterman v. Andrews*, 14 R. I. 589, 599; *Kelley v. Meins*, 135 Mass. 231, 235.

10 *Stocker v. Green*, 94 Mo. 280, 4 Am. St. Rep. 382. and note; *Bird v. Sellers*, 113 Mo. 580; *Horne v. Carter*, 20 Fla. 45; *Stubblefield v. Borders*, 92 Ill. 279; *Rhodes v. Gunn*, 35 Ohio St. 387; *Miller v. Beck*, 68 Mich. 76.

11 *Dean v. Tucker*, 58 Miss. 487.

12 *Weiskoph v. Dibble*, 18 Fla. 24.

§ 479. Same—Continued.

A defendant in ejectment who has no interest in the premises cannot defeat the action on the ground that the plaintiff's title has been divested

by a default judgment in foreclosure which, by mistake, included the land when it was not included in the complaint.¹ Possession of land by another, under a mistake as to the actual boundary, is not sufficient to defeat an action of ejectment by the holder of the legal title, but who, owing to such mistake, has never had possession.² So, in an action of ejectment, a decree in condemnation proceedings awarding the land to the defendant for right of way is no defense, where it appears that the plaintiff was the owner of the land and had not been made a party to the condemnation proceedings.³ So, possession by a mortgagee of land, acquired by force or fraud, against the will and consent of the owner, and without color of lawful authority, is no defense to an action of ejectment by such owner.⁴ Where, in ejectment, both plaintiff and defendant claim title from a common source, the plaintiff is required only to show the better title from such source, and the defendant cannot, for the purpose of defeating the complainant, impeach the validity of the title, or the source from whence both derived their title.⁵ Yet it is held that the defendant in such case can show that the plaintiff by some subsequent act has parted with his title, and has none at the time the action is brought. The effect of this is not to impeach the common source of title.⁶ So, in ejectment, the defendant

in possession, unable to show title in himself, may protect his possession and defeat the action by proving facts and circumstances from which it may be fairly inferred that the ancestor, under whom the plaintiff claims as heir, had in his lifetime parted with the title to the land, so that the plaintiff inherited nothing therein.⁷ Under a statute which requires the defendant in ejectment to plead the estate or licenses, under which he holds possession, an answer by way of general denial creates no issue under which evidence of his title is admissible, and, if the plaintiff pleads and proves any legal title to the premises, he thereby establishes a *prima facie* case.⁸ Where the defendant simply denied the allegations of the complaint, it was held that he could not introduce in evidence a copy of the record of a former recovery.⁹ A general denial and a further plea that the plaintiff obtained the land in suit by purchase at a void trustee's sale are held not to be inconsistent defenses under Missouri practice.¹⁰ An affirmative defense that the deed relied on by the plaintiff was a mortgage is covered by a denial of the plaintiff's allegation of ownership.¹¹ Where the action is brought to recover possession of two separate parcels of land, and the affirmative relief sought by the defendant relates to and affects each parcel, he is entitled to interpose, by way of answer and cross-complaint, any defense as to either or both of the parcels, and to ask any af-

firmative relief necessary and proper for such defense.¹² Where a statute allows the defendant in ejectment to recover for permanent improvements, a counterclaim alleging facts showing an adverse claim under color of title and in good faith, and stating the nature of the improvements and the payment of taxes, is sufficient, as against a general demurrer.¹³ But the grantee of a life tenant by quitclaim deed cannot counterclaim for the value of improvements made and taxes paid by him while holding under such deed, as against the owner of the fee. Such a deed cannot be made the basis of an adverse holding of the fee in remainder, because it does not purport to convey the remainder.¹⁴ Under the Wisconsin statute relative to pleading defenses in ejectment, it is held that facts which constitute a complete legal defense are not the proper subject of a counterclaim. As when a defendant claims under tax deeds, he cannot allege as a counterclaim that redemption receipts upon which the plaintiff relies to defeat such deeds are forged and fraudulent, and have such receipts set aside or canceled as a cloud upon the title.¹⁵

1 Clapp v. McCabe, 155 N. Y. 525; affirming, 84 Hun, 379.

2 Phinney v. Campbell, 16 Wash. 203.

3 Owen v. Railway Co., 12 Wash. 313.

4 Howell v. Leavitt, 95 N. Y. 617.

5 Collins v. Swanson, 121 N. C. 67; Sell v. McAnaw, 138 Mo. 267; Bleidorn v. Transportation Co. (Ot. Ch.

App. Tenn.), 43 S. W. Rep. 360; *Morris v. Wheat*, 11 App. Cas. D. C. 201; *Cox v. Hart*, 145 U. S. 376; and see sec. 461, ante.

6 *Moss v. Union Bank*, 7 Baxt. 216; *Bleidorn v. Transportation Co.* (Ct. Ch. App., Tenn.), 43 S. W. Rep. 860.

7 *Schauber v. Jackson*, 2 Wend. 13; *Hagenbuck v. McClaskey*, 81 Ind. 577.

8 *Allen v. Higgins*, 9 Wash. 446, 43 Am. St. Rep. 847.

9 *Piercy v. Sabin*, 10 Cal. 22, 70 Am. Dec. 692.

10 *Fisher v. Stevens*, 143 Mo. 181; and see *Ledbetter v. Ledbetter*, 88 Mo. 60; *Crowder v. Searcy*, 103 Mo. 97.

11 *Smith v. Smith*, 80 Cal. 323.

12 *Eureka v. Gates*, 120 Cal. 54.

13 *Parker v. Vinson*, 11 S. Dak. 381.

14 *Falck v. Marsh*, 88 Wis. 680.

15 *Brown v. Cohn*, 88 Wis. 627; and see *Weld v. Manufacturing Co.*, 86 Wis. 551.

§ 480. Abatement of Action.

The death of the plaintiff in ejectment does not abate the action.¹ If he dies, his heirs may be substituted in his place, as parties to the action, whether they desire it or not.² If a widow die, pending ejectment by her for possession of the mansion house and messuages, the suit may be revived in the name of her administrator.³ So, upon the death of a minor plaintiff in ejectment, the action does not abate, but the legal representative may be made a party and may proceed for the recovery of the land, mesne profits, and costs.⁴ In Alabama, if the sole plaintiff in ejectment die, or if one of several plaintiffs die, the revivor may

be in the name of the personal representative alone, or in the names of his heirs or devisees, or in the names of both the personal representatives and the heirs and devisees, to be determined by the extent of the recovery sought.⁵ At common law, the death of the defendant in ejectment abates the suit, and this rule still prevails in some of the states.⁶ In other states the rule has been changed by statute providing that the action shall not abate upon the death of the defendant.⁷

1 Funk v. Stubblefield, 62 Ill. 405; McKenzie v. Cook Co., 113 Mich. 452.

2 Ballentine v. Negley, 158 Pa. St. 475; and see Evans v. Welch, 63 Ala. 250; Fine v. Gray, 19 Mo. 33; Gould v. Carr, 33 Fla. 523; James v. Bennett, 10 Wend. 540.

3 Roberts v. Nelson, 86 Mo. 21.

4 Dean v. Feeley, 66 Ga. 273.

5 Evans v. Welch, 63 Ala. 250; and see Ex parte Swan, 23 Ala. 192.

6 People ex rel. Hoffman v. Circuit Judge, 40 Mich. 351; McKenzie v. Cook Co., 113 Mich. 452; Farrell v. Shea, 66 Wis. 561; and see Kissam v. Hamilton, 20 How. Pr. 369.

7 See Arundel v. Springer, 71 Pa. St. 398; Guyer v. Wookey, 18 Ill. 536.

§ 481. Matters of Evidence.

As a general rule, in actions of ejectment, the burden is on the plaintiff to show that he has a legal title, and the right of possession in the land.¹ But when he has established a title which is *prima facie* good, the burden is then cast upon

the defendant, and, if he undertakes to set up an outstanding title in a third person, he must establish the existence of it with clearness and precision, and generally such a one as would enable such third person to recover in ejectment against either of the parties to the suit.² So, in ejectment, the burden is upon the defendant to establish his claim of adverse possession. And if he has introduced evidence tending to show his adverse possession, the plaintiff may introduce evidence in rebuttal tending to show the contrary.³ It is held fatal to a recovery in ejectment that the plaintiff's evidence would not support a reasonable inference that the property described in the complaint was comprehended within the earlier grants, relied upon as links in the record chain of title.⁴ In ejectment, the declarations of the plaintiff's grantor, while in possession of the land, tending to show the character of his possession, are admissible in evidence;⁵ but even if such declarations be inadmissible as original evidence in disparagement of the plaintiff's title, they are clearly admissible in reply to evidence offered by the plaintiff as to the character of his grantor's possession.⁶ Where, in ejectment, the question is as to the true location of a line, declarations concerning such location made by one of the parties against his interest, are held to be admissible.⁷ But a question put to a party in ejectment, testifying in his own behalf, as to whether

or not he had ever admitted that the land in dispute did not belong to him, was held to have been properly excluded.⁸ In ejectment by the purchaser at a trustee's sale of the land, evidence of payments made by the party defendant showing a partial discharge of the notes secured by the deed of trust is rightly excluded, as such evidence does not show a satisfaction of the debt.⁹ The defendant in ejectment may prove prescriptive title in support of his general denial of the plaintiff's ownership.¹⁰ If, in such suit, the defendant claims title by virtue of a guardian's sale and conveyance, the fact that the required bond in the guardianship proceeding was approved by the judge of the court granting the guardian a license to sell may, like any other fact, be proved by the best evidence attainable.¹¹ It is not allowable to a defendant in an ejectment suit to prove an equitable interest for the amount bid for the land at a tax sale, as evidenced by an invalid deed of the sheriff, where he did not set up such equity in his answer.¹²

1 Wells v. Steckelberg, 52 Neb. 597, 66 Am. St. Rep. 529; Beecher v. Ferris, 117 Mich. 108; Wansor v. Lucas, 44 Neb. 759; Huneycutt v. Brooks, 116 N. C. 788; Reusens v. Lawson, 96 Va. 285; Alexander v. Gibbon, 118 N. C. 796, 54 Am. St. Rep. 757; and see sec. 462, ante.

2 Lannay v. Wilson, 30 Md. 546; Richardson v. Railway Co., 89 Md. 126; also sec. 477, ante.

3 Jennings v. Gorman, 19 Mont. 545.

4 *Jarvis v. Lynch*, 157 N. Y. 445. See *Sage v. Mayor*, 154 N. Y. 61, 61 Am. St. Rep. 592; and *Hess v. Rudder*, 117 Ala. 525, 67 Am. St. Rep. 182.

5 *Leger v. Doyle*, 11 Rich. 109, 70 Am. Dec. 240; *Levi v. Gardner*, 53 S. C. 24.

6 *Levi v. Gardner*, 53 S. C. 24; and see, to same effect, *Metz v. Metz*, 48 S. C. 472, 486; *Eilen v. Ellen*, 16 S. C. 135.

7 *Neal v. Hopkins*, 87 Md. 19.

8 *Watrous v. Morrison*, 33 Fla. 261, 39 Am. St. Rep. 139.

9 *Bensieck v. Cook*, 110 Mo. 173, 33 Am. St. Rep. 422.

10 *Cheatham v. Young*, 113 N. C. 161, 37 Am. St. Rep. 617.

11 *Myers v. McGavock*, 39 Neb. 843, 42 Am. St. Rep. 627.

12 *Patterson v. Galliher*, 122 N. C. 511; and see *Hinton v. Pritchard*, 102 N. C. 94; *Wilson v. Wilson*, 117 N. C. 351.

§ 482. Verdict and Judgment.

A verdict in an action of ejectment should so describe the land intended to be recovered as that the description copied into the writ will of itself show the officer the land he is to take.¹ But a general verdict in ejectment sustaining the cause of action laid in the declaration has been held sufficient, although it failed to specify the land recovered.² Nor are objections to the forms of verdicts in ejectment encouraged. Generally speaking, whenever the verdict is sufficiently certain to enable a court to give judgment and the sheriff to deliver possession, it will not be disturbed. And it is held that a verdict that "we, the jury, find for the plaintiff," is, in effect, a finding in

favor of the plaintiff for the premises in dispute, and the property being sufficiently described in the declaration or complaint, the verdict is not void for uncertainty.³ The verdict may be for a part only of the premises claimed, but such part should be specified with certainty.⁴ The verdict must not be for more land than the proof shows title.⁵ In some jurisdictions it is required by statute that the jury, on the trial of an action of ejectment, shall find the estate proved by the plaintiff, and if the verdict fails to specify any estate, no judgment can be rendered on it.⁶ And this is held to be so, although the declaration sets forth the estate of the plaintiff.⁷ But a verdict which finds that the plaintiff is the "owner" of the land is sufficiently explicit as to title, under such statute.⁸ The statute does not, however, dispense with the necessity for a finding of the plaintiff's right of possession.⁹ The sufficiency of a general verdict in ejectment is sustained by authority,¹⁰ and it will not be disturbed when founded upon substantially conflicting evidence.¹¹ But an equivocal verdict is insufficient and judgment will not be rendered thereon.¹² The judgment in ejectment should follow the verdict,¹³ and should specify particularly the estate to which the plaintiff is found to be entitled.¹⁴ A judgment may be rendered for the possession of the land, where the facts pleaded and proved entitle

the plaintiff to that relief, although the complaint contains no specific prayer for possession.¹⁵ In a plain ejectment suit the plaintiff, if entitled to recover, should have judgment for possession, and he cannot have a decree for equitable relief, although an equitable defense may be pleaded.¹⁶ As seen above, the plaintiff in ejectment may recover less than he claims in his declaration or complaint, but cannot recover more than he proves that he has the title to in himself.¹⁷ And it has been held that a cotenant suing in ejectment must prove the extent of his interest, or suffer judgment to be given for the defendant;¹⁸ and that such cotenant cannot recover possession of the whole property, though such possession is held by a stranger to the title.¹⁹ Under the Florida statute, a judgment in ejectment in favor of the plaintiff should state the quantity of the estate recovered, failing in which it must be set aside and a proper judgment entered by the court, conformable to the verdict.²⁰ In ejectment, a judgment in general terms for the defendant on a verdict favorable to him is sufficient.²¹ In some of the states the defendant will be granted affirmative relief.²² In determining whether the judgment in ejectment is adverse to a party, the court is not confined to the words used, but the judgment is to be considered with reference to the pleadings, and held to be as broad as the issues

raised thereby, upon which the court passed or might have passed in reaching the final conclusion.²³

1 Crawford v. Ahrnes, 103 Mo. 88; Benne v. Miller, 149 Mo. 228; Lawrence v. Davidson, 44 Cal. 177; Railroad Co. v. Jordan, 87 Cal. 23.

2 Hamner v. Eddins, 3 Stew. (Ala.) 192; and so, to same effect, Hutton v. Reed, 25 Cal. 478.

3 Johnson v. Jones, 68 Ga. 825; and so, to same effect. Goodhue v. Baker, 22 Ill. 262; Patrick v. Young, 18 Fla. 50; Johnson v. Visser, 96 Cal. 310; Hagey v. Detweiler, 35 Pa. St. 413; Olive v. Adams, 50 Ala. 374.

4 Bailey v. Jones, 14 Ga. 384; McCullough v. Railway Co., 106 Ga. 275; Den ex dem. Pierce v. Wanett, 10 Ired. 446; Bachop v. Critchlow, 142 Pa. St. 518; Moran v. Lezotte, 54 Mich. 83; Callis v. Kemp, 11 Gratt. 78. See Rupiper v. Calloway, 105 Wis. 4.

5 East St. Louis v. Hackett, 85 Ill. 382; Price v. Breckenridge, 77 Mo. 447; Gillespie v. Jones, 47 Cal. 259.

6 See Long v. Linn, 71 Ill. 152; Koon v. Nichols, 63 Ill. 163; Langren v. Brownlie, 22 Fla. 491.

7 Low v. Settle, 22 W. Va. 388; Oney v. Clendenin, 28 W. Va. 34.

8 Hadlock v. Hadlock, 22 Ill. 384.

9 Asia v. Hiser, 22 Fla. 378.

10 Cummings v. Peters, 56 Cal. 593-597; Ewing v. Alcorn, 40 Pa. St. 492; Kershner v. Kershner, 36 Md. 309; Mapes v. Scott, 94 Ill. 379.

11 Biggs v. Lloyd, 70 Cal. 447.

12 Woodson v. McCune, 17 Cal. 298.

13 Meraman v. Caldwell, 8 B. Mon. 32, 35, 46 Am. Dec. 537; Mapes v. Scott, 94 Ill. 379.

14 Koon v. Nichols, 63 Ill. 163.

15 Evans v. Schafer, 119 Ind. 49; and see Shotts v. Boyd, 77 Ind. 223; Shattuck v. Cox, 97 Ind. 242.

16 Springfield Engine etc. Co. v. Donovan, 147 Mo. 622.

17 See, also, *Clay v. White*, 1 Munf. 162; *Callis v. Kemp*, 11 Gratt. 78.

18 *Marshall v. Palmer*, 91 Va. 344, 50 Am. St. Rep. 838. See, also, *Dawson v. Mills*, 32 Pa. St. 302; *Craig v. McBride*, 9 Dana, 427.

19 *Marshall v. Palmer*, 91 Va. 344, 50 Am. St. Rep. 838; *Mobley v. Bruner*, 59 Pa. St. 481, 98 Am. Dec. 360. But see contra, *Chipman v. Hastings*, 50 Cal. 310; and so, to same effect, *Newman v. Bank of California*, 80 Cal. 368, 13 Am. St. Rep. 169; *George v. McGovern*, 83 Wis. 555, 35 Am. St. Rep. 77; and cases cited in note to *Marshall v. Palmer*, 91 Va. 344, 50 Am. St. Rep. 838.

20 *Neal v. Spooner*, 20 Fla. 38.

21 *Laramy v. Ruschke*, 46 Minn. 125; and see *Litchfield v. Railroad Co.*, 7 Wall. 270.

22 See *Gough v. Dorsey*, 27 Wis. 119; *Fisk v. Brunette*, 30 Wis. 102; *Hotaling v. Hotaling*, 47 Barb. 163; *Swon v. Stevens*, 143 Mo. 384; *Freeman v. Brewster*, 70 Minn. 203.

23 *Rupiper v. Calloway*, 105 Wis. 4.

§ 483. Effect of Judgment.

It is said that the action of ejectment stands on peculiar grounds as to the conclusiveness of judgments rendered therein, owing mainly to the fictitious proceedings in which such suits were usually clothed. And the general rule at common law is, that many suits may be maintained for the same property, on the same title, and between the same parties, and that a recovery in one or more suits will be no bar to a further suit.¹ This is held to be true whether the titles and defenses are the same or not.² But the above rule has been changed by statute in many of the states, and an action in the nature of ejectment settles

the title between the parties in favor of the one recovering the judgment.³ In Oregon, a judgment in an action of ejectment is a bar to any other action between the same parties and those claiming under them as to the same subject matter.⁴ The same rule is established in California, and it is held that a judgment in ejectment is, as to all matters put in issue and passed upon in the action, conclusive between the parties and their privies, and a bar to another action between the same parties or their privies where the same matters are directly in issue.⁵ So, in other jurisdictions, either by statute or by judicial determination, the effect of a judgment in ejectment, where the strength of the title is considered and passed upon, is as complete a bar to further contest as if personal property or personal rights had been the subject of contention.⁶ In Pennsylvania, at an early date, resort was had to the action of ejectment as a remedy for the enforcement of equitable rights in respect to real estate, this being a necessity growing out of the want of a court of chancery, or the possession by the common-law courts of such equitable jurisdiction as has since been conferred upon them.⁷ And it is there held that a judgment in equitable ejectment is conclusive not only as to the title of the land in suit, but it has all the conclusiveness of a decree in chancery as to every other matter litigated in that action.⁸ It is held in West Virginia

that a determination in ejectment that a will is invalid and cannot pass title to certain land, and that the plaintiff is entitled to only one-half thereof, does not, in a subsequent action of ejectment against different parties to recover the other half, brought by heirs who were not made parties to the first action, estop the parties to the last action from litigating the title to such other half, or the validity of the will as to the whole.⁹ A judgment in trespass quare clausum is held not to be a bar by way of estoppel to a real action, although the defendant in the trespass suit pleaded soil and freehold. The reason given is, that the defendant may have had the title, and at the same time the plaintiff may have had the rightful possession. The judgment, therefore, does not settle the title, and is not an estoppel to a real action, whether pleaded or offered in evidence.¹⁰

1 See *Jones v. De Graffenreid*, 60 Ala. 145, 152; *Mackenzie v. Renshaw*, 55 Md. 299.

2 *Kimmel v. Benna*, 70 Mo. 52; *St. Louis v. Lumber Co.*, 98 Mo. 613.

3 See *Reed v. Douglas*, 74 Iowa, 244, 7 Am. St. Rep. 476; *Mahoney v. Middleton*, 41 Cal. 41; *Hurd v. Commissioners*, 40 Kan. 92; *Marvin v. Dennison*, 1 Blatchf. 159; *Sturdy v. Jackaway*, 4 Wall. 174.

4 *Barrell v. Title Co.*, 27 Or. 77.

5 *Caperton v. Schmidt*, 26 Cal. 479, 85 Am. Dec. 187; *Thrift v. Delaney*, 60 Cal. 189; and see *Johnson v. Vance*, 86 Cal. 110, where this rule is recognized, but held not to apply in the particular case.

6 See *Hodges v. Eddy*, 52 Vt. 434; *Hentig v. Redden*, 46 Kan. 231, 26 Am. St. Rep. 91; *Johnson v. Pate*, 90 N. C. 334; *Glover v. Stamps*, 73 Ga. 209, 54 Am. Rep. 870; *Dawley v. Brown*, 70 N. Y. 390; *State Bank v. Bridges*, 11 Rich. 87; *Hawley v. Simons*, 102 Ill. 115; *Blanchard v. Brown*, 3 Wall. 245.

7 See *Seitzinger v. Ridgway*, 9 Watts, 496; sec. 456, ante.

8 *German-American etc. Co. v. Shallcross*, 147 Pa. St. 485, 30 Am. St. Rep. 751. See, also, *Schive v. Fansold*, 137 Pa. St. 82; *Preston v. Rickets*, 91 Mo. 320.

9 *Buford v. Adair*, 43 W. Va. 211, 64 Am. St. Rep. 354.

10 *Kimball v. Hilton*, 92 Me. 214.

§ 484. Recovery of Rents and Profits.

As a general rule, the right to mesne profits follows the recovery of possession of the premises claimed, or some part thereof.¹ The right of the one dispossessed to recover such profits in some form of action has always been recognized, and, at common law, mesne rents and profits were recovered by an action against the trespasser after recovery in ejectment.² In some jurisdictions, the plaintiff in ejectment may now declare for and recover mesne rents and profits in the ejectment suit.³ Under the Missouri statute, a judgment for the plaintiff in ejectment for accruing rents and profits is a substantive part of it, and as such is collectible on execution.⁴ In California practice, when, in ejectment, there is no finding as to the use and occupation of the premises, the plaintiff is not entitled to judgment for damages by way of mesne profits.⁵ A distinction is made be-

tween an action for mesne profits and an action for use and occupation. The latter is founded upon a promise, express or implied, while the former springs from a trespass, an entry *vi et armis*, upon premises, and a tortious holding. The action to recover mesne profits is an action *quare clausum fregit*, and cannot be maintained without proof of the trespass.⁶ The action will not lie while the defendant is in possession of the land.⁷ In Illinois, the supplemental action of trespass for mesne profits in ejectment is abolished by statute, and one who has recovered in ejectment, who seeks the recovery of damages for mesne profits, is required to file a suggestion of such claim within one year from the judgment.⁸ In respect to the amount of recovery, it is stated as a general rule that the computation of rent against a bona fide occupant should begin from the filing of the bill in ejectment, but against a mala fide possessor from his entry, if within the period prescribed in the statute of limitations for actions for mesne profits.⁹ So it is held that one who takes possession of land under a bona fide, though mistaken, claim of title is required to account only for the rents and profits actually received, and not for the rental value of the land. But if one comes tortiously into possession of an estate, he ought to be charged to the extent of what it was capable of producing.¹⁰ The point of distinction is said

to lie in the fact that one who goes into possession of the land of another as a bald trespasser, or acquires the possession by force or fraud, is entitled to no consideration at the hands of the court, and the strictest rule of accountability is, therefore, applied to him. But when one goes into possession under a bona fide claim of right, though it may eventually prove to be unfounded, he is not to be punished for his honest mistake, but is only required to account for such rents and profits as he has actually received, and not for the rental value of the premises.¹¹ Under the Missouri statute, rents and profits for a period prior to the commencement of an action of ejectment can be recovered only when it is shown that the defendant had knowledge of the plaintiff's claim.¹² A tenant in common in ejectment can recover only a proportion of mesne profits corresponding to his interest.¹³ In ejectment by a tenant in common against his cotenant, if there be no proof of an ouster, except a denial of the plaintiff's title and right of entry in the answer, the plaintiff can recover damages only from the date of the institution of the suit.¹⁴ Where the defendant entered upon land by license of the owner, which was revoked by his death, but the defendant still retained possession, an allowance as damages the mesne profits from the time of the death was held proper.¹⁵ An infant is entitled to come into equity for an account for

mesne profits from the date of the intrusion.¹⁶ In California, the plaintiff in ejectment, if he recover, is entitled to damages measured by the value of the rents and profits down to the time the judgment is rendered.¹⁷ And although the complaint in ejectment does not allege that the defendant had been in possession for any length of time prior to the commencement of the action, yet the court may include in its judgment for damages the value of the rents and profits from the commencement of the action down to the time of rendering judgment.¹⁸ In Illinois, the plaintiff in ejectment is not restricted to a recovery of rents accruing before the commencement of suit, but may recover for the rents and profits up to the time of filing his suggestions, if the defendant continues in possession.¹⁹

1 *Benson v. Matsdorf*, 2 Johns. 369; *Smith v. Benson*, 9 Vt. 138, 31 Am. Dec. 614.

2 See *Van Alen v. Rogers*, 1 Johns. Cas. 281, 1 Am. Dec. 113; *Holmes v. Davis*, 19 N. Y. 488; *Webster v. Stewart*, 6 Iowa, 403; *Dothage v. Stuart*, 35 Mo. 253; *Western Book Co. v. Jevne*, 179 Ill. 74.

3 See *Walker v. Mitchell*, 18 B. Mon. 541; *Robinson v. Jones*, 68 Miss. 794; *Miller v. Myles*, 46 Cal. 535; *Martin v. Durand*, 63 Cal. 43.

4 *Stump v. Hornback*, 109 Mo. 272. See, also, *Parsons v. Moses*, 16 Iowa, 441; *Davis v. Louk*, 30 Wis. 313.

5 *Camarillo v. Fenlon*, 49 Cal. 202.

6 *Thompson v. Bower*, 60 Barb. 477; *Young v. Downey*, 145 Mo. 261.

7 *Brown v. Carter*, 52 Mo. 46; *Fry v. Branch Bank*, 16 Ala. 282.

8 *Western Book Co. v. Jevne*, 179 Ill. 71. See, also, *Harding v. Larkin*, 41 Ill. 413; *Battin v. Bigelow*, 1 Pet. C. C. 452; *Budd v. Walker*, 9 Barb. 493.

9 *Pugh v. Bell*, 2 T. B. Mon. 125, 15 Am. Dec. 142. See, also, as sustaining this rule, *Williams v. Booker*, 12 Rob. (La.) 256; *Beaulieu v. Monin*, 50 La. Ann. 732; and compare *Pendergast v. McCaslin*, 2 Ind. 87; *Blodgett v. Hitt*, 29 Wis. 169; *Hill v. Meyers*, 46 Pa. St. 15; *Avent v. Hord*, 3 Head, 459; *New Orleans v. Gaines*, 15 Wall. 624.

10 *Johnson v. Lewis*, 2 Strob. Eq. 160; and see *Thomson v. Peake*, 38 S. C. 440; *Bradford v. Buchanan*, 39 S. C. 239.

11 *Pope, J.*, in *Rabb v. Patterson*, 42 S. C. 528, 46 Am. St. Rep. 743.

12 *Clarkson v. Hatton*, 143 Mo. 47, 65 Am. St. Rep. 635; and see *Whitledge v. Wait*, *Sneed* (Ky.), 335, 2 Am. Dec. 721, and note.

13 *Clark v. Huber*, 20 Cal. 196; *Brown v. Warren*, 16 Nev. 241; *Fenton v. Miller*, 116 Mich. 45, 72 Am. St. Rep. 502.

14 *Miller v. Myles*, 46 Cal. 535.

15 *Watson v. Railway Co.*, 46 Minn. 321.

16 *Robertson v. Simmons*, 4 Heisk. 141. Compare *Lancaster v. Lancaster*, 13 Lea, 132.

17 *Love v. Shartzer*, 31 Cal. 488.

18 *Hihn Co. v. Fleckner*, 106 Cal. 95.

19 *Ringhouse v. Keener*, 63 Ill. 230.

§ 485. Allowance for Improvements.

At common law, there was no liability on the part of the true owner to pay for improvements made by an occupying claimant of land, who had no title thereto, but all such improvements became part of, and passed with, the recovery of the land. But it is now otherwise by statute, and the defendant in ejectment is allowed for permanent

and valuable improvements in reduction of the rents and profits, provided he held under color of title, and made such improvements in good faith.¹ The constitutionality of statutes so providing is well established by authority.² It is, however, essential that the improvements should have been made in good faith—that is, in the honest belief that the title to the property was vested in the party making the improvements. And where one makes permanent improvements upon land, knowing at the time that he is not the owner, but only with the expectation of subsequently acquiring title, he cannot recover their value of the owner under the statute. Such improvements become the property of the owner of the land, and his title is not divested by the fact that the occupant subsequently acquires color of title.³ A statute giving to occupants of land, who hold under color of title, and in good faith, the right to compensation and to hold possession on account of improvements made and taxes paid, either before or since the enactment of the statute, has been sustained as constitutional.⁴ Under the code of Louisiana, the evicted party may recover for useful improvements, taxes, or other charges for the preservation of the property, upon the principle that the real owner cannot profit at the expense of him who, during his possession under a title, though void, has by his expenditures improved and thereby augmented the value of the property.⁵ A

person in possession of land under color of title, who makes permanent improvements upon the property, is presumed to be acting in good faith until the contrary appears.⁶ And a permanent improvement is defined to be something done or put upon the land by the occupant which he cannot remove, either because it has become physically impossible to separate it from the land, or, in contemplation of law, it has been annexed to the soil and become a part of the freehold.⁷ In Wisconsin, the claim of the defendant in ejectment for the value of his improvements should be both made and tried before judgment in the ejectment suit.⁸ In Missouri, a claim for improvements cannot be tried in an ejectment suit, but must be preferred, after judgment for possession, in a direct proceeding for that purpose in the court which rendered the judgment in ejectment.⁹ The defendant in an ejectment suit cannot set up as a defense the price paid for improvements, but only the enhanced value of the land.¹⁰

1 See *Parsons v. Moses*, 16 Iowa, 440; *Lunquest v. Ten Eyck*, 40 Iowa, 213; *Chesround v. Cunningham*, 3 Blackf. 82; *Barrett v. Stradl*, 73 Wis. 385, 9 Am. St. Rep. 795, and note; *Jones v. Merrill*, 113 Mich. 433, 67 Am. St. Rep. 475; *Seymour v. Cleveland*, 9 S. Dak. 94; *Parker v. Vinson*, 11 S. Dak. 381.

2 See *Armstrong v. Jackson*, 1 Blackf. 374, 12 Am. Dec. 225; *Whitney v. Richardson*, 31 Vt. 306; *Love v. Shartzler*, 31 Cal. 487; *Fee v. Cowdry*, 45 Ark. 410, 55 Am. Rep. 560; *Lee v. Bowman*, 55 Mo. 400; *Holt v. Adams* (Sup. Ct., Ala.), 25 So. Rep. 716.

3 *Read v. Howe*, 49 Iowa, 65; *Snell v. Mechan*, 80 Iowa, 53; *Carpentier v. Small*, 35 Cal. 346; *McLellan v. Omodt*, 37 Minn. 157; and so, to same effect, *Thomas v. Thomas*, 69 Miss. 566; *Wood v. Wood*, 83 N. Y. 575.

4 *Fee v. Cowdry*, 45 Ark. 410, 55 Am. Rep. 560. See, also, *Railway Co. v. Newson*, 70 Iowa, 355.

5 *Beaulieu v. Monin*, 50 La. Ann. 732; and so, to same effect, *Wood v. Nicholls*, 33 La. Ann. 744; *Genella v. Vincent*, 50 La. Ann. 956. Setoff of taxes against rents: See *Vaughn v. Vaughn*, 100 Tenn. 282, 286; *Stark v. Starr*, 1 Saw. 15.

6 *Stark v. Starr*, 1 Saw. 15.

7 *Stark v. Starr*, 1 Saw. 15. Whether the improvements were permanent is a question of fact: *Parker v. Vinson*, 11 S. Dak. 381.

8 *Scott v. Reese*, 38 Wis. 636; and see *Thomas v. Rewey*, 36 Wis. 328.

9 *Fairchild v. Cresswell*, 109 Mo. 29. See *Chesround v. Cunningham*, 3 Blackf. 82.

10 *Harman v. Harman*, 54 S. C. 100.

§ 486. Right to Crops.

The general rule of the common law is, that one who recovers land in ejectment is entitled to the crops then growing on the premises, such crops being regarded as part and parcel of the realty.¹ This ruling rests upon the fact that in law the defendant is treated as a trespasser.² And the fact that the successful plaintiff may have his action for mesne profits does not affect his right to crops grown on the land wrongfully withheld from him, since that remedy may be wholly unavailing, by reason of the defendant's insolvency.³ In some of the states the rule of the common law above stated has been modified

by statute.⁴ It is held in North Carolina that crops produced on land by the labor of one in adverse possession under a claim of right belong to him, and are not the property of the rightful owner of the soil, who cannot, therefore, recover them or their value from one who received them from the person in adverse possession, and converted them to his own use.⁵ The rule as declared by the supreme court of Oklahoma is, that where there has been a recovery of the possession of the land held adversely, the successful plaintiff is entitled to the growing crops, as against the evicted defendant who planted them. But, until such adverse possession has been terminated by ouster, the party so adversely holding is the owner, and entitled to the crops produced by his annual labor and cultivation, which were harvested before such ouster.⁶ And this is held to be so, although the defendant may be indebted to the plaintiff for the use of the premises.⁷

1 *McLean v. Bovee*, 24 Wis. 295, 1 Am. Rep. 185; *Page v. Fowler*, 39 Cal. 412, 2 Am. Rep. 462; *Samson v. Rose*, 65 N. Y. 411; *Thweat v. Stamps*, 67 Ala. 96; *Carlisle v. Killebrew*, 89 Ala. 329; *Rowell v. Klein*, 44 Ind. 290, 15 Am. Rep. 235; *Collier v. Cunningham*, 2 Ind. App. 254, 262; *Phillips v. Keysaw*, 7 Okla. 674.

2 *Altes v. Hinckler*, 36 Ill. 275, 85 Am. Dec. 407.

3 *McGinnis v. Fernandes*, 135 Ill. 69, 25 Am. St. Rep. 347.

4 As in Alabama: See *Carlisle v. Killebrew*, 89 Ala. 329.

5 *Faulcon v. Johnston*, 102 N. C. 264, 11 Am. St.

Rep. 737; and see *Ray v. Gardner*, 82 N. C. 454; *Brothers v. Hurdle*, 10 Ired. 490, 51 Am. Dec. 400.

6 *Phillips v. Keysaw*, 7 Okla. 674.

7 *Phillips v. Keysaw*, 7 Okla. 674.

§ 487. Writ of Possession.

The successful plaintiff in ejectment has the right to take possession of the land, by virtue of the judgment in his favor, without any writ, if he can peaceably do so, but he may not enter with force.¹ And possession on behalf of a plaintiff recovering in ejectment is usually, if not always, had in practice by a writ of possession, for which the judgment is a sufficient warrant.² The office of the writ is simply to carry the judgment into effect. The writ is addressed to the sheriff, commanding him to take possession of the recovered premises, and deliver them to the plaintiff, whoever may be in possession of them, whether the defendant himself or his privies.³ It is likewise the duty of the sheriff, if so required, to remove from the premises the personal property thereon,⁴ but the failure to do so does not vitiate the execution of the writ when possession of the land is delivered.⁵ But a judgment in ejectment gives the plaintiff therein no right of entry on land in the possession of a person who is neither party nor privy to the judgment;⁶ and the sheriff cannot put out of possession persons not being nor holding under the defendant, although they came into possession subsequently to the issuing

of the writ of ejectment.⁷ If the recovered lands are subject to an easement, the sheriff can execute the judgment by delivering possession subject to the easement.⁸ As against the defendant and those holding under him, the successful plaintiff is also entitled to be placed in possession of the growing crops, provided he has not recovered mesne profits.⁹ Ordinarily, in executing a writ of possession, the successful plaintiff must be put into full and complete possession. And it is held that the execution of a writ of possession, issued in ejectment brought by a landlord because of nonpayment of rent, must be an open, visible, and notorious change of possession, and that a merely nominal and secret execution of the writ is not sufficient.¹⁰ The plaintiff in ejectment having obtained a judgment, the defendant will be enjoined from interfering with the execution of process for the delivery of the premises, and from interfering in any way with the possession of the premises acquired under such process.¹¹ At common law, the issue of a writ of possession after the lapse of a year and a day would be irregular, except in cases where it had been enjoined, stayed by agreement, appeal, or writ of error. If issued after the expiration of that time, it would not be void, but voidable only.¹² The court that renders the judgment in ejectment is said to exercise a species of equitable jurisdiction over the writ of possession, recalling it if justice requires,

and sometimes, after it has been executed, awarding a writ of restitution.¹³ So, it is held that a command to return the writ within a specified time is directory merely, and that the writ can be lawfully executed after the return day thereof.¹⁴ A stranger to the judgment in ejectment, if improperly turned out of possession in executing the writ of possession, may, in certain cases, on motion to the court, be restored to the possession.¹⁵ So, the court will, on motion in the action, order restitution when the execution exceeds the verdict and the judgment.¹⁶ As where the judgment awards possession of an undivided interest to the plaintiff, but the execution directs possession of the whole premises to be delivered to him, the court will order restitution to the defendant of his interest in the premises.¹⁷ The fact that the land in controversy is inaccessible at the time of trial or judgment, so that the sheriff cannot deliver possession thereof, is no obstacle to a recovery in ejectment.¹⁸

1 *Jackson v. Haviland*, 12 Johns. 229-235; *Witbeck v. Van Rensselaer*, 64 N. Y. 31; *Tribble v. Frame*, 5 Litt. Sel. Cas. 190; *Petty v. Malier*, 15 B. Mon. 603; *Caldwell v. Walters*, 22 Pa. St. 378; *Craft v. Yeane*, 66 Pa. St. 210.

2 *Witbeck v. Van Rensselaer*, 64 N. Y. 31; *People v. Cooper*, 20 Hun, 486; *Hinton v. McNeil*, 5 Ohio, 509, 24 Am. Dec. 315.

3 *Jackson v. Tuttle*, 9 Cow. 233, 240; *Den v. Bilderback*, 16 N. J. L. 497; *Satterlee v. Bliss*, 36 Cal. 489; *Camp-Meeting Assn. v. Patterson*, 96 Pa. St. 469; *Huerstal v. Muir*, 64 Cal. 450.

4 *People v. Cooper*, 20 Hun, 486.

5 Witbeck v. Van Rensselaer, 64 N. Y. 27.

6 Kercheval v. Ambler, 7 J. J. Marsh. 626, 23 Am. Dec. 446.

7 Krepps v. Mitchell, 156 Pa. St. 320. Compare Scheerer v. Goodwin, 125 Cal. 154, 156; Wetherbee v. Dunn, 36 Cal. 147, 95 Am. Dec. 166.

8 Reformed Church v. Schoolcraft, 65 N. Y. 134; Wager v. Railroad Co., 25 N. Y. 526; Lozier v. Railroad Co., 42 Barb. 465; Kenniston v. Hannaford, 58 N. H. 28.

9 Gardner v. Kersey, 39 Ga. 664, 99 Am. Dec. 484; and see Gillett v. Balcom, 6 Barb. 370; Lane v. King, 8 Wend. 584, 24 Am. Dec. 105; sec. 486, ante.

10 Newell v. Whigham, 102 N. Y. 20.

11 Bushong v. Rector, 32 W. Va. 311, 25 Am. St. Rep. 817; De Lancey v. Piepgras, 73 Hun, 608, 610; 26 N. Y. Supp. 807; 141 N. Y. 88; 56 N. Y. St. Rep. 651; Cupps v. Irvin, 2 Blackf. 112, 18 Am. Dec. 136. See, as to issue of alias writ, where the plaintiff has been ousted before the return of the writ, Jackson v. Hawley, 11 Wend. 184; Van Rensselaer v. Witbeck, 2 Laus. 499; after the return of the writ, Dent v. Simmons, 7 J. J. Marsh. 42; United States v. Slaymaker, 4 Wash. C. C. 169.

12 Bowar v. Railway Co., 136 Ill. 101.

13 Oetgen v. Ross, 47 Ill. 147; and see Coleman v. Henderson, 2 Scam. 251; Jackson v. Hasbrouck, 5 Johns. 366; Perry v. Tupper, 70 N. C. 538.

14 Witbeck v. Van Rensselaer, 64 N. Y. 27.

15 Hall v. Hilliard, 6 Ala. 43.

16 Jackson v. Hasbrouck, 5 Johns. 366; Jackson v. Stiles, 5 Cow. 418; Land Assn. v. Christy, 41 Cal. 501; Natchez v. Vandervelde, 31 Miss. 706, 66 Am. Dec. 581.

17 Skinner v. Odenbach, 30 N. Y. Supp. 624; 62 N. Y. St. Rep. 598; 81 Hun, 315. See, also, Smith v. Pretty, 22 Wis. 655; Hall v. Dexter, 3 Saw. 434.

18 Woodhull v. Rosenthal, 61 N. Y. 382.

§ 488. Costs.

The New York statute awards costs to the successful party, as a matter of right, in cases where the title to real property is in question.¹ But this applies only to actions at law as distinguished from actions in equity.² In ejectment to recover two separate parcels of land, separately described in the complaint, which contained only one count, the plaintiff recovered but one of such parcels, and it was held that both plaintiff and defendant were entitled to costs.³ Under the California statute, if the plaintiff in ejectment recovers judgment when the allegations of his complaint are denied, he is entitled to costs, although his recovery is only for a portion of the demanded premises, and the defendant recovers judgment for the residue.⁴ And the prevailing rule is, that if the plaintiff in an action in which the title to realty is involved recovers in such action, he is entitled to costs, without regard to the amount of the recovery.⁵ But where the plaintiff's title is admitted, or is not put in issue by the defendant's answer, costs will depend upon the amount of the plaintiff's recovery.⁶

1 *Niles v. Lindsley*, 8 How. Pr. 131; *Boardway v. Scott*, 31 Hun, 378; *Kelly v. Railway Co.*, 81 N. Y. 233.

2 *Law v. McDonald*, 9 Hun, 23.

3 *Coon v. Diefendorf*, 8 N. Y. Civ. Proc. 293.

4 *Havens v. Dale*, 30 Cal. 547; *Lawton v. Gordon*, 37 Cal. 207. See, also, *Crowell v. Smith*, 35 Hun, 182.

5 Ames v. Meehan, 63 Wis. 408; Kelly v. Railway Co., 81 N. Y. 233; Bentley v. Jones, 7 Or. 108; Labean v. Labean, 61 Mich. 81; Bachman v. Gross, 150 Pa. St. 516.

6 Lynk v. Weaver, 128 N. Y. 171.

§ 489. New Trial.

Being an ejectment case is no reason at all against granting a new trial.¹ And the unsuccessful party in an action of ejectment, as in other civil cases, is entitled to a new trial for sufficient legal cause, such as an erroneous ruling of the court in the admission or exclusion of evidence, a misdirection of the court to the jury, or a finding of the jury contrary to the evidence.² Even greater latitude in applications for new trials is allowed in actions for the recovery of real property than in other civil actions.³ But a new trial will not be granted to enable a party to produce merely cumulative evidence, nor to produce newly discovered evidence, if by the use of reasonable diligence he could have obtained the evidence on the trial.⁴ So it is said that although the law permits a defendant in ejectment to set up an outstanding title in a third person with which he has no connection, yet it is a defense stricti juris, and new trials will not be granted to enable a defendant to avail himself thereof, unless the court below have either refused to permit it to be made, or have grossly erred in acting upon it.⁵ By statutory provisions in a number

of the states new trials in ejectment are now allowed as a matter of right. Upon proper application, a new trial is ordered as a matter of course, the court having no discretion to exercise in the matter.⁶ These statutory provisions generally restrict the party to one new trial, as a matter of right, and he cannot have a second without cause.⁷ After the two new trials allowed by the New York statute, the unsuccessful party must be left to pursue the ordinary rights of a suitor by an appeal on a bill of exceptions or a case.⁸ The second new trial allowed by the statute is discretionary with the court, and it must find that substantial justice requires a new trial.⁹ In no case is a party entitled to a new trial in ejectment, under the statute, unless he has first complied with the conditions precedent therein named;¹⁰ and one of such conditions usually imposed is the payment of all the costs adjudged against the applicant on the former trial.¹¹ In some of the states the payment of the damages awarded is also made a condition precedent.¹² The party seeking a new trial under the New York statute is required to pay all costs and damages, other than for rents and profits or for use and occupation. But where the damages included what is technically known at common law as mesne profits, the party is not required to pay them as a condition.¹³ Although a party be entitled to a new trial as a matter of right under

the statute, yet if he does not make application therefor, the court does not err in failing to grant it.¹⁴ The application under the Kansas statute is governed by the same rules which govern applications for new trials in other actions.¹⁵ In Indiana the application must be in writing,¹⁶ and should at least show the rendition of the judgment in the cause, the time when rendered, that all the costs had been paid, and that a new trial was demanded as of right and without cause.¹⁷ The application must be made in the court where the judgment was rendered;¹⁸ and within the time allowed by the statute.¹⁹ As a general rule, notice of the application need not be given to the opposite party or his attorney.²⁰ A demand for a new trial under the Minnesota statute may be made by the party himself, and a notice embodying such demand, made in his name by an agent authorized by him to make such demand, if seasonably served, is sufficient.²¹ A new trial will not be granted under the Indiana statute, as a matter of right, after judgment by default.²² But a new trial will be granted under the New York statute, in case of default, when justice requires that the judgment should be opened.²³ Where a party brings an action in equity to set aside a deed, instead of an action of ejectment, he thereby waives any right to a new trial under the New York statute.²⁴ Having selected that court as the proper tribunal to ad-

judicate upon his cause, he must be held to have waived any right to relief under the provisions of the statute.²⁵ The statute applies to an action of ejectment, and includes only an action at law to recover possession of land strictly.²⁶

1 Goodtitle v. Clayton, 4 Burr. 108; Taylor v. Sutton, 15 Ga. 107, 60 Am. Dec. 682.

2 Emmons v. Bishop, 14 Ill. 152; Baze v. Arper, 6 Minn. 220.

3 Jackson v. Dickenson, 15 Johns. 309, 8 Am. Dec. 236; Clayton v. Yarrington, 33 Barb. 144; White v. Poorman, 24 Iowa, 108.

4 Laffin v. Herrington, 17 Ill. 399; and see Phyfe v. Masterson, 13 Jones & S. 338.

5 Turley, J., in Peck v. Carmichael, 9 Yerg. 325, 328.

6 Emmons v. Bishop, 14 Ill. 152; Rogers v. Wing, 5 How. Pr. 50; Harris v. Waite, 54 How. Pr. 113; Haseltine v. Simpson, 61 Wis. 427.

7 See Boland v. Gillett, 44 Wis. 329; Crews v. Ross, 44 Ind. 481; Deming v. Douglass, 60 Kan. 738.

8 Harris v. Waite, 54 How. Pr. 113; Bellinger v. Martindale, 8 How. Pr. 113; Wright v. Milbank, 9 Bosw. 672. Compare Keeler v. Dennis, 39 Hun, 18.

9 Phyfe v. Masterson, 13 Jones & S. 338.

10 Emmons v. Bishop, 14 Ill. 153; Zimmerman v. Marchland, 23 Ind. 474.

11 Golden v. Snellen, 54 Ind. 282; Setzke v. Setzke, 121 Ill. 30; Wings v. De La Rionda, 20 Civ. Proc. Rep. 183; Harris v. Waite, 54 How. Pr. 113; Whitlock v. Vancleave, 39 Ind. 511. Poverty is no excuse for the failure to pay: Ex parte Shear, 92 Ala. 596.

12 See Myers v. Phillips, 68 Ill. 270.

13 Risley v. Rice, 11 Civ. Proc. Rep. 367.

14 West v. Cameron, 39 Kan. 736.

15 Clayton v. School Dist., 20 Kan. 256; and see Doster v. Sterling, 33 Kan. 381.

16 Falls v. Hawthorn, 30 Ind. 444.

17 *Crews v. Ross*, 44 Ind. 481, 487; *Marsh v. Elliott*, 51 Ind. 519.

18 *Cunningham v. Milwaukee*, 13 Wis. 120; *Christopher v. Railroad Co.*, 56 Mich. 176; *Deming v. Douglass*, 60 Kan. 738; *Hyatt v. Challiss*, 55 Fed. Rep. 267.

19 See *Haseltine v. Simpson*, 61 Wis. 427.

20 *Haseltine v. Simpson*, 61 Wis. 427; and see *Stanley v. Holliday*, 113 Ind. 525.

21 *West v. Railway Co.*, 40 Minn. 189.

22 *Fisk v. Baker*, 47 Ind. 534.

23 *Reed v. Loucks*, 61 How. Pr. 434; and see *Purdy v. Bennett*, 68 Hun, 227; 22 N. Y. Supp. 817; 51 N. Y. St. Rep. 876.

24 *Butts v. Fillmore*, 45 N. Y. St. Rep. 452. See, also, *Voss v. Eller*, 109 Ind. 260; *Somerville v. Donaldson*, 26 Minn. 75.

25 *Shumway v. Shumway*, 42 N. Y. 143. See, as to the waiver of the right, *Ladd v. Hildebrant*, 27 Wis. 135, 9 Am. Rep. 445.

26 *McConnell v. McCullough*, 14 N. Y. St. Rep. 621; 47 Hun, 405; and see *Tompkins v. Railroad Co.*, 30 S. O. 479; *Hall v. Hedrick*, 125 Ind. 326; *Blackford v. Loveridge*, 10 Kan. 101; *Hawkins v. Heinzman*, 126 Ind. 551.

§ 490. Effect of Dismissal Before Second Trial.

The granting of a second trial under the statute as a matter of right is one of the steps toward the final disposition of an action for the recovery of real property, and a dismissal by the plaintiff after the first judgment is vacated amounts to a waiver of another trial.¹ It is a surrender;² and it is held that the institution of a subsequent action after dismissal of the first would be a fraud upon the law.³

1 *Deming v. Douglass*, 60 Kan. 738.

2 *Deming v. Douglass*, 60 Kan. 738.

3 *Fraser v. Weller*, 6 McLean, 12; *Cunningham v. Milwaukee*, 13 Wis. 120; *Hyatt v. Challiss*, 59 Kan. 426; 55 Fed. Rep. 267.

§ 491. Writ of Assistance.

A writ of assistance is a summary proceeding, in extensive use in the United States, having for its object to put a party who has purchased real estate at judicial sales into possession of the premises.¹ The most familiar instance of its use is where land has been sold under a decree foreclosing a mortgage.² It is an appropriate process to issue from a court of equity to place a purchaser of mortgaged premises under its decree in possession, as against parties who are bound by the decree, and who refuse to surrender possession pursuant to its direction or other order of the court.³ And the power to issue the writ results from the principle that the jurisdiction of the court to enforce its decree is coextensive with its jurisdiction to determine the rights of the parties, and to subject to sale the property mortgaged.⁴ But the process applies as well to any other sale enforcing a lien, whereby the title and right of the property would pass to a purchaser, and where the party in possession was a party to the suit, or came into possession under him *pendente lite*.⁵ It is, however, held that the summary proceeding by writ of assistance is not *res adjudicata* as to many questions that may arise, and that a right to the writ does not deprive the party of the

fuller remedy afforded by the ordinary action of ejectment.⁶ The writ is proper only where a party concluded by the proceedings refuses to give up possession, and it should not be granted without proper evidence of such refusal after the right of possession is established.⁷ It cannot regularly be issued at the instance of one not a party to the cause;⁸ and it can only issue against the defendants in the suit and parties holding under them, who are bound by the decree.⁹ It should not issue against one not a party to the suit, and who did not enter *pendente lite*.¹⁰ The rights of persons not parties will not be adjudicated in an application for the writ.¹¹ And the writ will not issue against one holding under a title which could not be litigated in the suit.¹² Where land is decreed to a party in an action for divorce, which is in the nature of a suit in equity, a writ of assistance will issue to place such party in possession of the property awarded by the decree.¹³ The writ will issue to put an execution purchaser in possession when the rights of the parties affected have been fully determined by judgment;¹⁴ but the exercise of the power rests in the sound discretion of the court, and will not be exercised in cases of doubt, nor under color of its exercise will title be tried or decided.¹⁵ So, in general, the writ is only allowed when the right is clear, and when there is no equity or appearance of equity in the defendant, and where the

sale and proceedings under the decree are beyond suspicion.¹⁶ A sheriff may lawfully convey to the assignee of a purchaser of lands sold under execution at law or in equity, and such grantee will be entitled to a writ of assistance against a defendant remaining in possession.¹⁷

1 See *San Jose v. Fulton*, 45 Cal. 316; *Kershaw v. Thompson*, 4 Johns. Ch. 609; *Creighton v. Paine*, 2 Ala. 158; *Gilcreest v. Magill*, 37 Ill. 300.

2 As to which, see *Trope v. Kerns*, 83 Cal. 553; *Diggle v. Boulden*, 48 Wis. 477; *Beatty v. De Forest*, 27 N. J. Eq. 482; *Bell v. Birdsall*, 19 How. Pr. 491.

3 *Terrell v. Allison*, 21 Wall. 289; *Motz v. Henry* (Kan. Ct. App.), 54 Pac. Rep. 796.

4 *Id.*; *Kershaw v. Thompson*, 4 Johns. Ch. 609; *Hibernia etc. Soc. v. Lewis*, 117 Cal. 580; *Goodenow v. Ewer*, 16 Cal. 468, 76 Am. Dec. 545.

5 *Jones v. Hooper*, 50 Miss. 510; and see *Commonwealth v. Dieffenbach*, 3 Grant Cas. 368; *Stanley v. Sullivan*, 71 Wis. 585, 5 Am. St. Rep. 245; *Mills v. Tukey*, 22 Cal. 373, 83 Am. Dec. 74; *Lynde v. O'Donnell*, 12 Abb. Pr. 286; *Gorton v. Paine*, 18 Fla. 117; *Gormley v. Clark*, 134 U. S. 338; *Root v. Woolworth*, 150 U. S. 401.

6 *Trope v. Kerns*, 83 Cal. 553; *Dickey v. Gibson*, 121 Cal. 276.

7 *Chandler v. Childs*, 42 Mich. 128-131.

8 *Wilson v. Polk*, 13 Smedes & M. 131, 51 Am. Dec. 151, and extended note.

9 *Burton v. Lies*, 21 Cal. 87; and see *Gelpeke v. Railroad Co.*, 11 Wis. 454; *Jones v. Hooper*, 50 Miss. 510; *Miller v. Bate*, 56 Cal. 135; *Root v. Paine*, 22 Ill. App. 249; 121 Ill. 77.

10 *Comer v. Felton*, 61 Fed. Rep. 731, 10 C. C. A. 28.

11 *Enos v. Cook*, 65 Cal. 178; *Gilcreest v. Magill*, 37 Ill. 300; *Henderson v. McTucker*, 45 Cal. 647.

12 *Hayward v. Kinney*, 84 Mich. 591.

13 *Kirsch v. Kirsch*, 113 Cal. 56.

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14 *Stanley v. Sullivan*, 71 Wis. 585, 5 Am. St. Rep. 245.

15 *Stanley v. Sullivan*, 71 Wis. 585, 5 Am. St. Rep. 245; *Vanmeter v. Borden*, 25 N. J. Eq. 414; and see *Barton v. Beatty*, 28 N. J. Eq. 412; *Langley v. Voll*, 54 Cal. 435.

16 *Blauvelt v. Smith*, 22 N. J. Eq. 31; *Schenck v. Conover*, 13 N. J. Eq. 220, 78 Am. Dec. 95; *Thomas v. De Baum*, 14 N. J. Eq. 41.

17 *Eking v. Murray*, 29 N. J. Eq. 388.

§ 492. Same—Procedure.

To entitle a party to the writ of assistance, the petition should show the sale under the decree, the purchase, the deed by the commissioner, payment of the money, if the sale was made for cash, that the deed was exhibited to the defendant, and praying that the writ may issue.¹ The complainant must present to the court facts showing the necessity of the writ.² It is not alone sufficient to show a sheriff's deed, but the judgment, execution, levy, and sale must be shown, and also that the land was not subject to redemption, or has not been redeemed.³ And if the petition fails to show that the defendants against whom the proceeding is brought are in possession of the land, it is fatally defective.⁴ If persons are in possession as the tenants of the defendant in the original decree, or otherwise, that fact should be set forth in the petition, and they be made parties, and served with notice, and, if the facts warrant, an order should be made on them for possession, and on a failure to comply with it, the writ

should be awarded against them and the original defendant.⁵

1 Jones v. Hooper, 50 Miss. 510; Ludlow v. Lansing, 1 Hopk. Ch. 232; Creighton v. Paine, 2 Ala. 158.

2 Smith v. Brittenham, 3 Ill. App. 62; Bruce v. Roney, 18 Ill. 67; Sharpe v. Roe, 13 Bush, 461; Bunnell v. Thompson, 12 Bush, 116.

3 Sharpe v. Roe, 13 Bush, 461.

4 Oglesby v. Pearce, 68 Ill. 220.

5 Oglesby v. Pearce, 68 Ill. 220; and see Jackson v. Warren, 32 Ill. 331; Holt v. Reid, 46 Ill. 181, as further illustrating the practice in Illinois courts.

§ 493. Writs of Entry.

Writs of entry to recover the possession of lands are in use in a few of the states, in a form modified by statute. This is so in Massachusetts, and, in order to maintain the writ, it is not necessary to show an actual wrongful dispossession or exclusion of the demandant, or an adverse possession by the tenant. But under the statute the demandant is required to prove only that he is entitled to such an estate as he claims, and that he has a right of entry, and, if he proves such estate and right of entry, he can recover, unless the tenant proves a better title in himself.¹ It is held that a mere equitable estate will not support the writ.² Nor can easements or restrictions be recovered or enforced in a writ of entry, and need not be set forth therein.³ But under the Massachusetts statute, the demandant in a writ of entry is entitled to recover rents and profits,

although not specifically demanded in the writ.⁴ And an equitable defense to a writ of entry is sustained under the Massachusetts statute.⁵ The plaintiff must recover upon the strength of his own title, and not upon the weakness of that of the defendant.⁶ And to sustain the writ under the Maine statute, the plaintiff must not only prove that he has such an estate in the demanded premises as he claims, but he must also prove that at the time of suing out the writ he had a right of entry into the demanded premises.⁷ He must show seisin and right of entry within twenty years before the date of his writ. Having shown this, he may recover, unless the defendant shows a better title in himself, not in another, under whom he does not claim.⁸ One entitled to an estate in remainder only, subject to an existing life estate, cannot maintain the writ against one rightfully in possession under the life estate.⁹ The writ must be in form an attachment or summons, or an original summons, and must be served in the manner appropriate to the form used.¹⁰ In Maine practice, four things are necessary to a good declaration in a writ of entry: 1. The premises demanded must be clearly described; 2. The estate which the demandant claims in the premises must be stated, whether it be a fee simple, a fee tail, for life, or for years; and, if for life, then whether for his own life or that of another; 3. An allegation that the demandant was seised

of the estate claimed within twenty years; and
4. A disseisin by the tenant.¹¹ An allegation in the declaration that the demandant is seised "in his demesne as of fee," is held a sufficient allegation that he is seised in fee simple.¹² The word "fee" without any adjunct or limitation describes the same quantity of estate as the term "fee simple."¹³ Therefore, when the plaintiff in a writ of entry demands possession of a parcel of land with the buildings thereon, giving a proper description by metes and bounds, and duly alleging that he was seised thereof in his demesne as of fee and in mortgage within twenty years last past, and was disseised by the defendant, his declaration is not bad on demurrer under the statute requiring him to "set forth the estate he claims in the premises, whether in fee simple, fee tail, for life, or for years."¹⁴ A trustee holding the legal title to land need not set forth in a writ of entry that he is trustee.¹⁵ Defects in the declaration may be supplied by amendment.¹⁶ And, in a proper case, it is within the power of the judge to allow an amendment of the description of the land in a writ of entry.¹⁷ Under a plea of nul disseisin to a writ of entry, the tenant may show title in himself. Such plea puts the whole title in issue, and the tenant can maintain the issue, either upon the failure of the demandant to show title in himself, or by evidence of title in the tenant.¹⁸ But the defendant, under

that plea, cannot defeat the action by showing title in a stranger under whom he does not show title in himself, unless such title proves that the plaintiff was not seised within twenty years.¹⁹ In some jurisdictions nontenure must be pleaded in abatement, and not in bar.²⁰ If, on a writ of entry, the defendant disclaims as to a part, and pleads the general issue as to the residue, and a verdict is rendered in favor of the demandant for the whole, the verdict is not invalid, but he may have judgment for the parcel intended to be found, if material for a sufficient description exists, upon entering a remittitur as to the residue.²¹ Where, pending the action, the tenant dies and his heirs are summoned in under the statute, the latter are not restricted in their defense to the title of their ancestor, but may set up any title they have from any other source.²² If a demandant proves title only to an undivided portion of the premises, he can have judgment only for that portion.²³ If it appears that the demandants are tenants in common of the demanded premises with some persons unknown, they are entitled to judgment only for their undivided portions, although the tenant has only a possessory title.²⁴ It is settled law in Maine that if, pending the action, the title to the land and the right of possession become vested in the defendant by operation of law, without the concurrence of the plaintiff, this fact may be

pleaded in bar of the further prosecution of the suit.²⁵ But this defense must be specially pleaded in bar of the further prosecution of the suit, and not in bar of the suit generally.²⁶ In a writ of entry to recover a parcel of land owned by a married woman and occupied by her husband with herself and their children, the husband's possession is asserted by making him a tenant in the action, and is admitted by his plea of nul disseisin merely.²⁷ An equitable title is not put in issue by the plea of nul disseisin. And the entry of judgment for the tenant, where the plea was nul disseisin, is not a bar to a bill in equity by the demandant to compel the tenant to convey the same land to him, upon the ground of an implied trust arising out of an agreement to sell the land.²⁸

1 Twomey v. Linnehan, 161 Mass. 91. Compare Perry v. Weeks, 137 Mass. 587; Litchfield v. Scituate, 136 Mass. 39.

2 Chapin v. Universalist Soc., 8 Gray, 580; Sawyer v. Skowhegan, 57 Me. 500; Ela v. Pennock, 38 N. H. 154; Johnson v. Elliot, 26 N. H. 67.

3 Institution for Savings v. Burnham, 128 Mass. 458; Proprietors etc. v. Railroad Co., 104 Mass. 1, 6 Am. Rep. 181; Ayer v. Phillips, 69 Me. 50; Kenniston v. Hannaford, 58 N. H. 28.

4 Institution for Savings v. Burnham, 128 Mass. 458.

5 Nott v. Manufacturing Co., 142 Mass. 479.

6 Chapin v. Barker, 53 Me. 275.

7 Sylvester v. Sylvester, 83 Me. 46.

8 Hewes v. Coombs, 84 Me. 434; Morse v. Sleeper, 58 Me. 335; Gibson v. Savings Bank, 69 Me. 579; and see Walcot v. Knight, 6 Mass. 418.

9 *Sylvester v. Sylvester*, 83 Me. 46. See *Wyman v. Brown*, 50 Me. 139; *Kerley v. Kerley*, 13 Allen, 286, as to parties.

10 *Richardson v. Rich*, 66 Me. 249; and see *Wilbur v. Ripley*, 124 Mass. 468.

11 *Wyman v. Brown*, 50 Me. 143; and compare *Tappan v. Tappan*, 36 N. H. 98; *Sparhawk v. Bagg*, 16 Gray, 583; *Baker v. Bessey*, 73 Me. 472, 40 Am. Rep. 377; *Martin v. Martin*, 51 Me. 366; *Howard v. Holy Cross College*, 116 Mass. 117.

12 *Butrick v. Tilton*, 141 Mass. 93.

13 2 Blackstone's Commentaries, 104-106.

14 *Jordan v. Record*, 70 Me. 529; and so, to same effect, *Baker v. Bessey*, 73 Me. 472, 40 Am. Rep. 377.

15 *Simpson v. Dix*, 131 Mass. 179.

16 See *Howe v. Wildes*, 34 Me. 566; *Bowman v. Pinkham*, 71 Me. 295; *Thayer v. Hollis*, 3 Met. 369.

17 *Howe v. Lowell*, 171 Mass. 575.

18 *Swan v. Stephens*, 99 Mass. 7; *Croacher v. Oesting*, 143 Mass. 195.

19 *Hewes v. Coombs*, 84 Me. 434.

20 *Hatch v. Brier*, 71 Me. 542; *Hathorn v. Corson*, 77 Me. 582; *Stark v. Brown*, 40 N. H. 345. But see *Porter v. Rummery*, 10 Mass. 64.

21 *Odlin v. Gove*, 41 N. H. 465, 77 Am. Dec. 773. Compare *Peaks v. Blethen*, 77 Me. 510; *Tappan v. Water Power Co.*, 157 Mass. 24.

22 *Savings Inst. v. Crossman*, 76 Me. 577.

23 *Clarke v. Hilton*, 75 Me. 426.

24 *Butrick v. Tilton*, 141 Mass. 93; see 155 Mass. 461.

25 *Hilliker v. Simpson*, 92 Me. 590; *Leavitt v. School Dist.*, 78 Me. 574. Contra, *Hooper v. Bridgewater*, 102 Mass. 512.

26 *Leavitt v. School Dist.*, 78 Me. 574.

27 *Southworth v. Edwards*, 152 Mass. 203.

28 *Ryder v. Loomis*, 161 Mass. 161; and see *Russell v. Lewis*, 2 Pick. 508.

§ 494. Writ of Entry to Foreclose Mortgage.

At common law, as between mortgagor and mortgagee, the latter has the legal estate and the right of possession even before a breach of the condition, when there is no agreement to the contrary.¹ The mortgagee may enter immediately after the execution of the mortgage, put out the mortgagor, and receive the profits, if there be no agreement to the contrary, and if the mortgagor refuse to quit, the mortgagee may have a writ of entry, to recover against him as a disseisor.² The writ may be sustained before condition broken, and without previous notice of suit, unless it appears expressly, or by necessary implication, that the mortgagor should remain in possession.³ In New Hampshire practice, a writ of entry, when used to foreclose a mortgage, is held for the most part to be governed by the same rules of pleading and practice as when the title of the demandant is absolute.⁴ An administrator can maintain the writ to foreclose a mortgage, and a declaration in common form is held sufficient.⁵ A writ of entry to foreclose a mortgage under the Massachusetts statute differs from an ordinary writ of entry, and is in the nature of a bill in equity, and governed by the same rules as to parties and relief.⁶ A second mortgagee may maintain the writ to foreclose against the first mortgagee and owner of the equity of redemp-

tion.⁷ But a cestui que trust cannot maintain the writ.⁸ Two mortgagees, holding several mortgages, given at the same time to secure several obligations, are tenants in common, and may join in a writ of entry to foreclose their mortgages under the Massachusetts statute.⁹ Or either of them may enforce his mortgage by separate suit, if necessary to secure his rights.¹⁰ But one of two or more joint mortgagees cannot maintain a writ of entry under the statute.¹¹ In New Hampshire, if a mortgage be given to secure several notes held by different parties, a writ of entry to foreclose the mortgage must be brought in the names of all the holders of the several notes.¹² A mortgagee who has entered upon the mortgaged premises for the purpose of foreclosure, and who has duly filed a certificate thereof, may nevertheless maintain a writ of entry to foreclose the mortgage, and may have a conditional judgment.¹³ A writ of entry to foreclose a mortgage made to an unincorporated association, or to a partnership by a corporate or firm name, must be brought in the names of the individuals who compose the firm, and do business, and received the mortgage, under such corporate or firm name.¹⁴ Under the Maine and Massachusetts statutes, the action may be brought against whoever is tenant of the freehold.¹⁵ This is held to exclude a tenant at will,¹⁶ or ten-

ant for years, if he is ready and willing to give up the possession of the mortgaged premises.¹⁷ But if he denies the mortgagee's right, and refuses to give up the possession, the mortgagee may treat him as a tenant of the freehold, by disseisin, and maintain a writ of entry against him.¹⁸ The writ cannot be maintained against the mortgagor alone after his estate has been conveyed to a third person, and by him conveyed to the mortgagor's wife to her sole and separate use, although the mortgagor has continued to occupy the premises with his wife and family, providing for their support and maintenance. In such case the wife must be regarded as tenant of the freehold.¹⁹ But the mortgagor may always be properly joined as a party defendant, although he may have parted with the equity of redemption before the commencement of the action, and disclaims an interest in the premises.²⁰ The same defenses may be made in the action, except the statute of limitations, which might be made in an action upon the note secured by the mortgage.²¹ In any such action the court will enter judgment as at common law, when neither party claims the conditional judgment under the provisions of the statute.²² No conditional judgment can be rendered on behalf of a mortgagee or his assignee, unless he proves both an indebtedness and its amount.²³ The bond or note secured by

the mortgage must be produced, or its nonproduction accounted for.²⁴ The amount due on the mortgage is ascertained by the court, and the judgment is conditional that, if the amount is not paid within a certain time, the plaintiff shall have possession.²⁵ The amount due is to be ascertained according to equity and good conscience.²⁶ Such conditional judgment is conclusive as to the amount found due, as between the parties,²⁷ and estops the defendant from afterward setting up any defense, in a suit on the note, secured by the mortgage.²⁸ But is held not to be conclusive against one who has purchased the equity of redemption before the bringing of the writ of entry and who was not a party to the suit, on a bill in equity by him to redeem the land.²⁹ In adjudging the amount due for which the conditional judgment shall be rendered, the court will have reference to the date of the judgment, and not to the date of the writ, as in ordinary cases.³⁰ Claims in setoff may be allowed.³¹ The demandant cannot recover money paid for insurance if neither party moved for a conditional judgment.³²

1 Howard v. Houghton, 64 Me. 445; and see sec. 466, ante.

2 Newall v. Wright, 3 Mass. 138, 3 Am. Dec. 98.

3 Hobart v. Sanborn, 13 N. H. 226, 38 Am. Dec. 483; Trustees etc. v. Connolly, 157 Mass. 272.

4 Green v. Cross, 45 N. H. 581.

5 *Benton v. Collins*, 67 N. H. 498; and see *Bickford v. Daniels*, 2 N. H. 71.

6 See *Webster v. Vandeventer*, 6 Gray, 428; *Holbrook v. Bliss*, 9 Allen, 69; *Cochran v. Goodell*, 131 Mass. 464. So, under the Maine statute: See *Treat v. Pierce*, 53 Me. 71.

7 *Doten v. Hair*, 16 Gray, 149; *Kilborn v. Robbins*, 8 Allen, 466; *Cochran v. Goodell*, 131 Mass. 464.

8 *Young v. Miller*, 6 Gray, 154.

9 *Cochran v. Goodell*, 131 Mass. 464.

10 *Cochran v. Goodell*, 131 Mass. 464; *Burnett v. Pratt*, 22 Pick. 556; *Gilson v. Gilson*, 2 Allen, 115.

11 *Webster v. Vandeventer*, 6 Gray, 428.

12 *Noyes v. Barnet*, 57 N. H. 605; *Johnson v. Brown*, 31 N. H. 405.

13 *Trustees etc. v. Connolly*, 157 Mass. 272; *Beavin v. Gove*, 102 Mass. 298. Compare *Burgess v. Stevens*, 76 Me. 559.

14 *Pomeroy v. Latting*, 2 Allen, 221.

15 *Dooley v. Potter*, 140 Mass. 49.

16 *Inhabitants etc. v. Snow*, 12 Met. 157, note.

17 *Wheelwright v. Freeman*, 12 Met. 154.

18 *Wheelwright v. Freeman*, 12 Met. 154; *Johnson v. Phillips*, 13 Gray, 198.

19 *Campbell v. Bemis*, 16 Gray, 485; and see *Beal v. Warren*, 2 Gray, 447, 458; *Conant v. Warren*, 6 Gray, 562.

20 *Straw v. Greene*, 14 Allen, 206.

21 *Vinton v. King*, 4 Allen, 562; *Davis v. Bean*, 114 Mass. 361; *Thayer v. Mann*, 19 Pick. 535; *Fuller v. Eastman*, 81 Me. 284; and see *Northy v. Northy*, 45 N. H. 141.

22 *Howard v. Houghton*, 64 Me. 445; *Institution for Savings v. Burnham*, 128 Mass. 458; and see *Hadley v. Hadley*, 80 Me. 459; *Ladd v. Putnam*, 79 Me. 569.

23 *Blethen v. Dwinal*, 35 Me. 556.

24 *Powers v. Patten*, 71 Me. 583; *Vose v. Handy*, 2 Me. 322, 11 Am. Dec. 101.

25 *Dooley v. Potter*, 140 Mass. 49, 52; and see *Fuller v. Eastman*, 81 Me. 284.

26 Holbrook v. Bliss, 9 Allen, 69; Kilborn v. Robbins, 8 Allen, 472; Freeland v. Freeland, 102 Mass. 475, 480.

27 Sparhawk v. Wills, 5 Gray, 423, 427; Freison v. Bates College, 128 Mass. 466; Minot v. Sawyer, 8 Allen, 78; Fuller v. Eastman, 81 Me. 284.

28 Fuller v. Eastman, 81 Me. 284.

29 Dooley v. Potter, 140 Mass. 49.

30 Northy v. Northy, 45 N. H. 141.

31 Northy v. Northy, 45 N. H. 141; Davis v. Thompson, 118 Mass. 497.

32 Institution for Savings v. Burnham, 128 Mass. 458.

CHAPTER XXXIII.

FORCIBLE ENTRY AND DETAINER.

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§ 495. Early Statutes.

Forcible entries into lands, withheld from the rightful proprietors, were permitted by the ancient common law of England. But this summary power to right one's self by entry, where the right of entry existed, was found by experience to be very prejudicial to the public peace,

by giving opportunity to powerful men, under the pretense of feigned titles, forcibly to eject their weaker neighbors, and this gave rise to the numerous English statutes against forcible entry and detainer, the earliest among them being enacted toward the close of the fourteenth century.¹ These statutes were highly penal in character, and were enforced by indictment of the grand jury or by complaint before a magistrate, and terminated, when unfavorable to the offender, in a fine to the king, and an ouster from the premises unlawfully entered, as a punishment for the offense, and not as a determination of any right of the parties.² It was held that an indictment would also lie at common law for a forcible entry though the indictments are generally brought on the acts of parliament.³ One who enters a dwelling-house by force, without lawful warrant, is indictable at common law.⁴

1 See *Hyatt v. Wood*, 4 Johns. 150, 4 Am. Dec. 258; *People v. Anthony*, 4 Johns. 198; *Ives v. Ives*, 13 Johns. 235; *Page v. Dwight*, 170 Mass. 29; *Jackson v. Farmer*, 9 Wend. 201; *Tribble v. Frame*, 17 J. J. Marsh. 601, 23 Am. Dec. 439; *Dustin v. Cowdry*, 23 Vt. 631; *Evill v. Conwell*, 2 Blackf. 133, 18 Am. Dec. 138, 139, extended note; *Rex v. Wilson*, 3 Ad. & E. 817.

2 See *Rex v. Wilson*, 3 Ad. & E. 817; *Murry v. Burris*, 6 Dak. Ter. 170, 175; *People v. Smith*, 24 Barb. 16.

3 *Rex v. Bake*, 3 Burr. 1732; and see *Rex v. Storr*, 3 Burr. 1699; *Rex v. Wilson*, 8 Term Rep. 357.

4 *State v. Leathers*, 31 Ark. 44.

§ 496. Later Statutes.

In modern times the early statutes against forcible entry and detainer have undergone great changes, and although the summary character of the proceedings in general remains, yet modern statutes of forcible entry and detainer retain but little of their former force and character, so great have been the changes wrought by legislation. Under these later statutes, a party whose possession has been unlawfully entered upon may have the intruder summarily ejected, not for the purpose of punishing the trespasser, but for the purpose of protecting private rights, and the action or proceeding is generally prosecuted, not in the name of the sovereign, but in the name of the injured party.¹ The object of forcible entry and detainer acts now in force in the several states of the Union is declared to be, to provide a summary method by which the possession of real property wrongfully withheld may be obtained.² The common law affords no civil remedy against one who, having the right, enters forcibly another's premises, and the injured party must resort to the statutory action of forcible entry and detainer.³ It is essentially an action given to protect actual occupation of real estate against unlawful intrusion or forcible detention.⁴ In Illinois, forcible entry and detainer is called a civil proceeding for restitution, based upon, and

by modern legislation evolved from the English forcible entry and detainer, which was a criminal proceeding merely.⁵ The sole object of the proceeding is to regain a possession which has been invaded.⁶ The proceeding, being a special statutory one, summary in its nature, and in derogation of the common law, the statute conferring jurisdiction must be strictly pursued in the method of procedure prescribed by it, or the jurisdiction will fail to attach, and the proceeding be *coram non judice*.⁷ Nor can the proceeding be allowed in any case not clearly within the statute.⁸ The special act relating to the subject, having provided a mode of proceeding, cannot be affected by a subsequent general act relating to procedure.⁹

1 See *Murry v. Burris*, 6 Dak. Ter. 170, 175. History of legislation on the subject in Massachusetts: See *Page v. Dwight*, 170 Mass. 29.

2 *State v. Parker*, 12 Wash. 685; *Murry v. Burris*, 6 Dak. Ter. 170.

3 *Fuhr v. Dean*, 26 Mo. 116, 69 Am. Dec. 484; *Carter v. Anderson*, 16 Daly, 437.

4 *O'Neill v. Jones*, 72 Minn. 446; *Wood v. Phillips*, 43 N. Y. 152; *People v. Leonard*, 11 Johns. 504.

5 *French v. Miller*, 126 Ill. 611, 9 Am. St. Rep. 651; and see *Romero v. Gonzales*, 3 N. Mex. 35; *Carter v. Anderson*, 16 Daly, 437; *Warburton v. Doble*, 38 Cal. 619; *Archey v. Knight*, 61 Ind. 311.

6 *Robinson v. Crummer*, 5 Gilm. 218; *Thompson v. Sornberger*, 59 Ill. 326.

7 *French v. Miller*, 126 Ill. 611, 9 Am. St. Rep. 651;

and see *House v. Keiser*, 8 Cal. 500; *Davis v. Davis*, 115 Pa. St. 261; *Burns v. Nash*, 23 Ill. App. 552.

8 *Dowling v. Hannant*, 78 Mich. 115.

9 *State v. Parker*, 12 Wash. 685.

§ 497. What Possession or Occupancy is Requisite.

The summary remedy of forcible entry and detainer is designed to protect the actual possession, whether rightful or wrongful, against unlawful invasion.¹ It must accordingly be shown that the defendant did enter without the consent of the person having the possession in fact of the premises. The plaintiff must prove that he or his grantor was in the actual and peaceful possession of the premises in dispute.² It is held that one fact absolutely essential to a recovery in this action, the plaintiff having no title, is his actual possession of the lands prior to the defendant's alleged forcible entry.³ And mere constructive possession, or evidence that the plaintiff is entitled to possession, is not sufficient.⁴ Nor can this action be maintained on a mere "scrambling possession," but the intention to occupy must be manifested in some open and unequivocal way.⁵ It is, however, held that an actual foothold is not always required.⁶ It is also held that actual possession sufficient to maintain the action may exist without fencing or residence.⁷ Any act done by the plaintiff on the premises showing an intention to hold posses-

sion, for the purpose of cultivation and improvement, is sufficient.⁸

1 Johnson v. West, 41 Ark. 535; Wood v. Phillips, 43 N. Y. 152; Romero v. Gonzales, 3 N. Mex. 35; Potts v. Magnes, 17 Colo. 364.

2 O'Neill v. Jones, 72 Minn. 446; Russell v. Desplons, 29 Ala. 308; Castro v. Tewksbury, 69 Cal. 564; Milligan v. Cuff, 14 Mont. 373.

3 Chesson v. Harrelson, 119 Ala. 435. Compare Hightower v. Fitzpatrick, 42 Ala. 597; Nicrosi v. Philippi, 91 Ala. 299; Kellum v. Balkum, 93 Ala. 317.

4 Johnson v. West, 41 Ark. 535; and see Emsley v. Bennett, 37 Iowa, 15; Powell v. Davis, 54 Mo. 315; Olinger v. Shepherd, 12 Gratt. 462; Mears v. Dexter, 86 Va. 828; Jones v. Shay, 50 Cal. 508; Barlow v. Burns, 40 Cal. 351; Giddings v. Land etc. Co., 83 Cal. 96.

5 Keen v. Schweigler, 70 Mo. App. 409; Anderson v. Mills, 40 Ark. 192; Conroy v. Duane, 45 Cal. 597; Brooks v. Warren, 5 Utah, 122.

6 O'Neill v. Jones, 72 Minn. 446; and see Leroux v. Murdock, 51 Cal. 541; Spiers v. Duane, 54 Cal. 176.

7 Goodrich v. Van Landigham, 46 Cal. 601; and see Conroy v. Duane, 45 Cal. 597; Webber v. Clarke, 74 Cal. 15; Valencia v. Couch, 32 Cal. 339, 91 Am. Dec. 589. Compare Allen v. Tobias, 77 Ill. 169.

8 Bradley v. West, 60 Mo. 59.

§ 498. Same—By Whom Maintainable.

Under the forcible entry and detainer acts in some of the states, the courts hold that a party must be entitled to the possession of the premises before he can recover. It is the person who has the legal right to the possession who is to institute the proceedings in the case of a forcible entry and detainer.¹ But the prevailing doctrine

is that a party, although he has no right to the possession, yet he may not be ousted from such possession by force, and if he is ousted by force he can recover the possession which he actually had by forcible entry and detainer proceedings.² It is held that the action may be maintained against any person who commits a forcible entry and ouster, even though the latter is the owner of the property, and entitled to immediate possession, if the plaintiff had at the time of the forcible ouster the actual and peaceable possession thereof.³ Such is also the doctrine maintained by the supreme court of the United States, in setting forth the general purpose of forcible entry and detainer statutes. * This general purpose is declared to be that, not regarding the actual condition of the title to the property, where any person is in the peaceable and quiet possession of it, he shall not be turned out by the strong hand, by force, by violence, or by terror. The person out of possession, although he may have the superior title or may have the better right to the present possession, must resort to legal means to obtain his possession. He must resort to the law alone to obtain what he claims.⁴ And this principle is held to be as fully applicable to the possession of a railroad, or a part of a railroad, as to any other class of landed interests.⁵ In short, all that is necessary to sustain the action

of forcible entry and detainer is, that the defendant should forcibly and illegally have turned the plaintiff out of possession.⁶ If the plaintiff was in the actual and peaceable possession of the premises, either as a tenant by sufferance, or otherwise, he may maintain the action, if dispossessed against his will, or by force.⁷ In Alabama, a personal representative may maintain the action, either in his representative or individual character, where he has been in the actual possession of the land.⁸ Where a tenant is turned out of possession, he alone, and not the landlord, can maintain the action.⁹ And it is held that a lessee, who actually occupies a part of the demised premises under a claim of the whole under his lease, has a sufficient possession of the entire premises to support an action of forcible entry therefor.¹⁰ And an action of unlawful detainer lies in favor of a subsequent lessee against a prior lessee who has forfeited his rights by the non-payment of rent.¹¹ Under the California statute (Code Civ. Proc., sec. 384), one cotenant may maintain an action of unlawful detainer without joining the other cotenants.¹² And in some jurisdictions it is held that one tenant in common may maintain an action of forcible entry against his cotenant, where he has been denied the right of the common possession. The fact that the original entry and possession of the oust-

ing tenant were lawful in no way excuses the violence or injury inflicted by him on his cotenant.¹³ But one joint tenant cannot recover the exclusive possession of the premises against his cotenant.¹⁴ An unexpired term of years is a sufficient estate to support the proceeding for forcible entry and detainer.¹⁵ It has been held that the proceeding may be maintained by the receivers of an insolvent bank against the execution debtor, when he continues in possession without their consent.¹⁶ So, under the statute of Colorado territory, a purchaser of land at a sheriff's sale could maintain unlawful detainer against the judgment debtor, and all who stood in the same situation, to recover possession of the premises so purchased.¹⁷ But it is held in Alabama that a purchaser of lands at a sale under a mortgage or deed of trust, who has never had actual possession, cannot maintain an action of unlawful detainer for their recovery.¹⁸ Where a grantor in possession conveys the property in trust, and the trustee conveys the same to the cestui que trust in accordance with the terms of the deed, the latter may maintain forcible entry and detainer against the grantor's tenant in possession, who refuses to surrender.¹⁹ A plaintiff who has been in peaceful possession of premises for eighteen months, raising two crops thereon, may maintain forcible entry and detainer against

the defendant who enters against his will, whether the plaintiff's original possession was right or wrong.²⁰ And it is held that persons who keep their private books, blanks, furniture, and other means required for the transaction of their private business as abstracters and conveyancers, in the office of a county recorder, and transact their business there, are in actual possession of at least so much of such office as is thus used, within the meaning of the forcible entry and detainer act.²¹ To maintain the action under the Justices' Civil Code of Procedure of Oklahoma, section 4805, it is only necessary for the plaintiff to establish that he has a clear right of possession at the time the notice to quit and vacate the premises is given.²²

1 *People v. Fulton*, 11 N. Y. 94; and see, also, *Sullivan v. Enders*, 3 Dana, 66; *Hoffman v. Harrington*, 22 Mich. 52; *Judy v. Citizen*, 101 Ind. 18.

2 *Campbell v. Coonradt*, 22 Kan. 704; *Burdette v. Corgan*, 27 Kan. 275; *Buettinger v. Hurley*, 34 Kan. 585, and see the cases cited in the preceding section.

3 *Peyton v. Peyton*, 34 Kan. 624; *Salinger v. Gunn*, 61 Ark. 414; *Emsley v. Bennett*, 37 Iowa, 15; *Stephens v. McCloy*, 36 Iowa, 659; *Oklahoma City v. Hill*, 4 Okla. 521; *Hyde v. Fraher*, 25 Mo. App. 414; *Brown v. Feagins*, 37 Neb. 256; *McCormick v. Sheridan*, 77 Cal. 253.

4 *Iron Mt. etc. R. R. Co. v. Johnson*, 119 U. S. 608, 611. See, also, in support of this doctrine, *McCauley v. Weller*, 12 Cal. 500; *Canavan v. Gray*, 64 Cal. 5; *Myers v. Koenig*, 5 Neb. 419; *Marks v. Sullivan*, 8 Utah. 411; *Farncomb v. Stern*, 18 Colo. 279; *Haupt v. Pittaluga*, 6 Bush, 493; *Lachman v. Barnett*, 18 Nev. 277.

5 *Iron Mt. etc. R. R. Co. v. Johnson*, 119 U. S. 608.

6 *Lorimier v. Lewis*, 1 *Morris*, 253, 39 *Am. Dec.* 461.

7 *Knight v. Knight*, 3 *Ill. App.* 206; *Jones v. Shay*, 50 *Cal.* 508; *House v. Camp*, 32 *Ala.* 541; *Emsley v. Bennett*, 37 *Iowa*, 15.

8 *Spear v. Lomax*, 42 *Ala.* 576; *Espalla v. Gottschalk*, 95 *Ala.* 254. See, also, *Havins v. Bickford*, 9 *Humph.* 673; *Beezley v. Burgett*, 15 *Iowa*, 192; *Lass v. Eisleben*, 50 *Mo.* 122; *Rice v. Brown*, 77 *Ill.* 549; *Knowles v. Murphy*, 107 *Cal.* 107.

9 *Hyde v. Fraher*, 25 *Mo. App.* 414; *Hays v. Porter*, 27 *Tex.* 92; *McCartney v. Alderson*, 49 *Mo.* 456; *Jones v. Shay*, 50 *Cal.* 508.

10 *Hosli v. Yokel*, 58 *Mo. App.* 169.

11 *Guffy v. Hukill*, 34 *W. Va.* 49, 26 *Am. St. Rep.* 901.

12 *Lee Chuck v. Wo Chong*, 91 *Cal.* 593. See, also, *Turner v. Lumbrick*, 1 *Meigs*, 7.

13 *Mason v. Finch*, 1 *Scam.* 495; *Eads v. Rucker*, 2 *Dana*, 111; *Presbrey v. Presbrey*, 13 *Allen*, 281; *Hershey v. Clark*, 27 *Ark.* 527; *Bowers v. Cherokee Bob*, 45 *Cal.* 495; *Lewis v. Oesterreicher*, 47 *Mo. App.* 79; and see *Marshall v. Palmer*, 91 *Va.* 344, 50 *Am. St. Rep.* 845, note.

14 *Jamison v. Graham*, 57 *Ill.* 94.

15 *Mead v. Daniel*, 2 *Port.* 86.

16 *Baker v. Cooper*, 57 *Me.* 388.

17 *Liss v. Wilcoxon*, 2 *Colo. Ter.* 85. Compare *Kratz v. Buck*, 111 *Ill.* 40; *Jackson v. Warren*, 32 *Ill.* 331.

18 *Womack v. Powers*, 50 *Ala.* 5.

19 *Muller v. Balke*, 167 *Ill.* 150; and see *Rice v. Brown*, 77 *Ill.* 549; *Peters v. Balke*, 170 *Ill.* 304.

20 *Crain v. Murry*, 76 *Mo. App.* 548.

21 *Hardin v. County of Sangamon*, 71 *Ill. App.* 103.

22 *Dysart v. Enslow*, 7 *Okla.* 386.

§ 499. Against Whom.

In order to maintain an action of forcible entry and detainer the party defendant must be in possession, unlawfully detaining the premises at

the time the action is brought.¹ But such showing may be made by proof that the defendant took forcible possession and placed another in possession whom he maintains therein.² One who participates in the forcible entry upon land in the peaceable possession of another is guilty at the same moment of a detainer, and if he continues to support and assist the party entering in remaining upon the premises, he continues the detainer, and may be properly joined as a defendant in the action.³ The defendant need not be present personally if the acts are done under his direction.⁴ But the action will not lie against a sheriff for executing a writ of restitution in good faith, although the person turned out, and who brings the action, was one whom the officer could not lawfully dispossess by virtue of the writ.⁵ And when the evidence fails to show that the defendant used force to repossess himself of premises from which he had been expelled by the plaintiff, within the meaning of the statute, the action will not lie.⁶ So it is held that an entry by a landlord, attended with no other force than that implied in every trespass, is not within the meaning of a forcible entry and detainer statute.⁷ One who peaceably enters upon a mining claim which has been abandoned for several months by another is not guilty of a forcible detainer simply for refusing to surrender possession on demand.⁸ It is held that the action may be

brought against husband and wife, although the latter may be a sole trader.⁹ In California, the entry and holding of an intending purchaser under a void verbal contract for the sale of the premises, with an agent of the vendor, who had no written authority to make the contract, constitutes the possessor a tenant at will of the owner of the land, who may maintain against him an action for unlawful detainer, after notice of thirty days to terminate the tenancy, and a subsequent three days' notice to quit.¹⁰ So where a lessee of land moved to the leased premises a house in the occupation of a third person, who refused to leave it, it was held that the occupant of the house, by voluntarily remaining therein, became a subtenant of the lessor, and subject to be dispossessed, under the lawful detainer act, in default of payment of the rent by the lessee.¹¹ If the owner of land, having the right to possession, makes a forcible entry, the person in the wrongful possession has his remedy under the statute for a forcible entry, and this remedy is exclusive.¹²

1 *Orrick v. Public Schools*, 32 Mo. 315; *Link v. Harrington*, 23 Mo. App. 429; *Loan v. Smith*, 76 Mo. App. 510; *Preston v. Kehoe*, 10 Cal. 445; 15 Cal. 315.

2 *Tuttle v. Davis*, 48 Mo. App. 9.

3 *Blumenthal v. Waugh*, 33 Mo. 181.

4 *Minturn v. Burr*, 20 Cal. 48.

5 *Janson v. Brooks*, 29 Cal. 214. See *Shelby v. Houston*, 38 Cal. 422; *Castro v. Tewksbury*, 69 Cal. 569.

6 Mullen v. Conyngham, 56 N. Y. Supp. 196.

7 Smith v. Building Assn., 115 Mich. 340, 69 Am. St. Rep. 575; and see Stearns v. Sampson, 59 Me. 568, 8 Am. Rep. 442; Allen v. Keily, 17 R. I. 731, 33 Am. St. Rep. 905. But see Mason v. Hawes, 52 Conn. 12, 52 Am. Rep. 552; and note to Mosseller v. Deaver, 19 Am. St. Rep. 544.

8 Laird v. Waterford, 50 Cal. 315; and see Conroy v. Duane, 45 Cal. 597.

9 Howard v. Valentine, 20 Cal. 282.

10 Hall v. Wallace, 88 Cal. 434.

11 Pardee v. Gray, 66 Cal. 524.

12 Canavan v. Gray, 64 Cal. 5; Burnham v. Stone, 101 Cal. 171. See sec. 498, ante.

§ 500. What Amounts to Forcible Entry.

It is very generally held that the elements of trespass and holding possession by force are essential elements of an action for forcible entry and detainer. Force is the gist of the action, and it must accordingly be shown that the defendant entered without the consent of the person in actual possession, and that the entry and subsequent holding of possession was with force and strong hand.¹ An entry which has no other force than that implied in every trespass is held not to be within the statute.² And more than mere words is necessary.³ In Georgia, an entry upon premises in defiance of the occupant, with such a display of force as to reasonably deter him from maintaining his possession, is a forcible entry. And it is held that, at common law, there can be no forcible entry in the absence of acts naturally tending to excite a breach of the peace.⁴ It is

also held that a quiet, peaceable entry cannot be converted into a forcible entry by subsequent acts of force.⁵ But the law is otherwise under forcible entry and detainer statutes in some of the states. Thus, any entry which is against the will of the occupant is a forcible entry within the meaning of the Illinois statute.⁶ So, in Missouri, it is held sufficient upon which to base an action of forcible entry, that the entry be made against the will of him who is in peaceable possession, and that there need be no actual force.⁷ The forcible breaking into a house, in the peaceable possession of another, in the absence of such possessor, is a forcible entry within the New Jersey statute.⁸ Under the Minnesota statute, it is sufficient to show that the entry was unlawful, but the detainer must have been by force and strong hand.⁹ Under the Iowa statute, the action of forcible entry and detainer is allowable "where the defendant has, by force or intimidation, or fraud or stealth, entered upon the prior actual possession of another in regard to real property, and detained the same."¹⁰ In California, "every person is guilty of a forcible entry who either: 1. By breaking open doors, or by any kind of violence or circumstance of terror enters upon or into any real property; or 2. Who, after entering peaceably upon real property, turns out, by force, threats, or menacing conduct, the party in possession."¹¹ In New Mexico, an action of

forcible entry and detainer will not lie, though the entry be unlawful, unless it be accompanied by actual force, stealth, intimidation, or fraud.¹² Where force is relied on, actual force in the nature of a breach of the peace must be shown.¹³ Under the Vermont statute, a conviction may be had for forcible detainer alone, where the complaint alleges forcible entry and forcible detainer, and a forcible detainer only is proved.¹⁴ In some of the states a summary action of unlawful detainer is provided by statute.¹⁵ The right of action is given to those who temporarily part with their right of possession under contract, such as exists between landlord and tenant. And in some jurisdictions the action is held to be maintainable only where the relation of landlord and tenant subsists between the parties to the action.¹⁶ In other jurisdictions the relation of landlord and tenant between the parties is not indispensable to the maintenance of the action.¹⁷ In Alabama, the action is said to be a substitute for the common-law remedy by ejectment.¹⁸ In such action a landlord may recover, not only against a tenant who entered under him, but also against one who, having attorned to him as landlord, holds over after the expiration of the term.¹⁹ Failure and refusal on the part of a tenant to pay rent according to the terms of his lease when due, in the absence of a stipulation to the contrary, terminates the lease and the tenant is lia-

ble to an action for forcible detention of the premises, under the Nebraska statute.²⁰

1 Johnson v. West, 41 Ark. 535; Schmidberger v. Bloner, 66 Hun, 527; Bliss v. Johnson, 73 N. Y. 529; State v. Mills, 104 N. C. 905, 17 Am. St. Rep. 706; Holmes v. Holloway, 21 Tex. 658; Milner v. Maclean, 2 Car. & P. 17; Edwick v. Hawkes, L. R. 18 Ch. Div. 199.

2 Smith v. Reeder, 21 Or. 541; and see Gray v. Finch, 23 Conn. 495; Shaw v. Hoffman, 25 Mich. 162; Hendrickson v. Hendrickson, 12 N. J. L. 202; Fort Dearborn Lodge v. Klein, 115 Ill. 177, 56 Am. Rep. 133.

3 Pharis v. Gere, 110 N. Y. 336.

4 Lewis v. State, 99 Ga. 692, 59 Am. St. Rep. 255; Curry v. Hendry, 46 Ga. 631; and see, to same effect, Foster v. Kelsey, 36 Vt. 199, 84 Am. Dec. 676. and note; Grughler v. Wheeler, 12 B. Mon. 183; Tischler v. Knick, 57 N. Y. Supp. 3; Knowles v. Ogleuree, 96 Ala. 555.

5 Tischler v. Knick, 57 N.Y. Supp. 3.

6 Reeder v. Purdy, 41 Ill. 279; Phelps v. Randolph, 147 Ill. 335; Roberts v. McEwen, 81 Ill. App. 413.

7 Oakes v. Aldridge, 46 Mo. App. 11; Dennison v. Smith, 26 Mo. 487.

8 Mason v. Powell, 38 N. J. L. 576.

9 Davis v. Woodward, 19 Minn. 174.

10 Stephens v. McCloy, 36 Iowa, 659. Under Wisconsin statute: See Jarvis v. Hamilton, 16 Wis. 574; Ainsworth v. Barry, 35 Wis. 136; under Kansas statute: Price v. Olds, 9 Kan. 66.

11 Cal. Code Civ. Proc., sec. 1159. See Hemstreet v. Wassum, 49 Cal. 273; Castro v. Tewksbury, 69 Cal. 562; Conroy v. Duane, 45 Cal. 606; Ely v. Yore, 71 Cal. 130; Eccles v. Union Pac. Coal Co., 15 Utah, 14; Brooks v. Warren, 5 Utah, 118. Forcible detainer defined: Cal. Code Civ. Proc., sec. 1160.

12 Romero v. Gonzales, 3 N. Mex. 35.

13 Romero v. Gonzales, 3 N. Mex. 35; citing Frazier v. Hanlon, 5 Cal. 156; McCauley v. Weller, 12 Cal. 500; Watson v. Whitney, 23 Cal. 375.

14 *Foster v. Kelsey*, 36 Vt. 199, 84 Am. Dec. 676. See, also, *Adams v. Helbing*, 107 Cal. 298.

15 See Cal. Code Civ. Proc., sec. 1161; *Davidson v. Ellmaker*, 84 Cal. 21.

16 So in Arkansas: *Mason v. Delancy*, 44 Ark. 444; and see *Davidson v. Ellmaker*, 84 Cal. 21; *Railroad Co. v. Ferry Co.*, 82 Ill. 230; *Dysart v. Enslow*, 7 Okla. 386.

17 See *Hightower v. Fitzpatrick*, 42 Ala. 597; *Spear v. Lomax*, 42 Ala. 576.

18 *Lomax v. Spear*, 51 Ala. 532.

19 *Nicrosi v. Phillipi*, 91 Ala. 299. See, also, as to the right of a landlord to maintain this action, *Silva v. Campbell*, 84 Cal. 420; *Jones v. Durrer*, 96 Cal. 95; *Espalla v. Gottschalk*, 95 Ala. 254; *McLain v. Calkins*, 77 Iowa, 468; *Parker v. Geary*, 57 Ark. 301; *Unger v. Bamberger*, 85 Ky. 11.

20 *Pollock v. Whipple*, 33 Neb. 752; *Hendrickson v. Beeson*, 21 Neb. 61.

§ 501. Questions of Title.

In an action of forcible entry and detainer, the question of title, as between the plaintiff and the defendant or anyone else, cannot be tried. The right to possession only is involved in the action.¹ It is said that the principle which lies at the foundation of all suits of forcible entry and detainer is, that the law will not sanction or support a possession acquired by violence, but will, when appealed to in this form of action, compel the party who thus gains possession to surrender it to the party whom he dispossessed, without inquiring which party owns the property or has the legal right to the possession.² In such actions the gist of the controversy depends upon

possession, and two questions are primarily presented: 1. Was the plaintiff at the time of the entry by the defendant exercising such acts of dominion over the property as constitute actual possession in law? and 2. Did the defendant deprive the plaintiff of this possession in such manner as to create a statutory cause of action?³ Title is not involved except as title may be incidentally offered in evidence to support the claim of right of possession.⁴ The question of title may, however, be an incident to, or evidence of, the right of possession, and in the trial of an action of forcible entry and detainer, may be inquired into sufficiently to determine the right of possession, and for such purpose only.⁵ Thus, this action cannot be maintained by a grantee against a grantor withholding possession, without the introduction in evidence, at the trial, of the grantee's deed, in order to show not only the extent of his possession, but his right to possession, even though questions of title cannot be tried in the action.⁶

1 *Peters v. Balke*, 170 Ill. 304; *Palmer v. Frank*, 169 Ill. 90; *Roberts v. McEwen*, 81 Ill. App. 413; *McClain v. Jones*, 60 Kan. 639; *Thorpe v. Atwood*, 100 Ga. 597; *Nicrosi v. Phillipi*, 91 Ala. 299; *Chisholm v. Weise*, 5 Okla. 217; *Youngs v. Freeman*, 15 N. J. L. 30; *Mitchell v. Davis*, 23 Cal. 381; *Voll v. Hollis*, 60 Cal. 573; *Boardman v. Thompson*, 3 Mont. 392; *Myers v. Koenig*, 5 Neb. 422.

2 *Iron Mt. etc. R. R. Co. v. Johnson*, 119 U. S. 608.

3 *Potts v. Magnes*, 17 Colo. 364.

4 *Conaway v. Gore*, 27 Kan. 122; *McClain v. Jones*, 60 Kan. 630; *Potts v. Magnes*, 17 Colo. 364; *Gale v. Eckhart*, 107 Mich. 465.

5 *McDonald v. Stiles*, 7 Okla. 327; and see *Settle v. Settle*, 10 Humph. 504; *Phillips v. Sampson*, 2 Head, 429.

6 *Peters v. Balke*, 170 Ill. 304; and so, to same effect, *Kepley v. Luke*, 106 Ill. 395; *Kratz v. Buck*, 111 Ill. 40.

§ 502. Does not Involve Equitable Jurisdiction.

The action of forcible entry and detainer is purely a proceeding at law, and does not and cannot involve the exercise of equitable jurisdiction.¹

And where a defendant has entered into possession of the premises under a written lease, which has not terminated by limitation or the mutual agreement of the parties, the plaintiff cannot in such action call into exercise equity powers, and ask restitution upon the ground that the defendant has forfeited his right to hold possession by committing waste upon the premises, by failing to keep them in repair, by selling and converting to his own use the undivided stock placed in his care, or by his neglecting to keep and care for the stock according to the terms of the lease.²

1 *Dysart v. Enslow*, 7 Okla. 386. See *Littell v. Grady*, 38 Ark. 584.

2 *Kellogg v. Lewis*, 28 Kan. 535.

§ 503. Jurisdiction—In What Courts.

Actions of forcible entry and detainer have been very generally made cognizable before jus-

tices of the peace.¹ And the constitutionality of statutes conferring on justices of the peace jurisdiction in such proceedings is sustained.² In such cases the value of the premises is wholly immaterial, and has no relevancy to the proceeding.³ But where an attempt is made to confer on justices of the peace the authority to try titles to real estate, without regard to the value of the land, it would be objectionable on constitutional grounds.⁴ Since the title to land cannot properly be put in issue in the proceeding, a plea bringing the title in question does not, when the case is before a justice of the peace, deprive him of jurisdiction.⁵ The trial may proceed until it is clear that title is drawn in question, but when this appears the action should be dismissed.⁶ But the effect of raising the question of title in some jurisdictions is to remove the cause to a higher court, having jurisdiction to try title.⁷ Under the constitution of California, justices of the peace have concurrent jurisdiction with the superior courts in cases of forcible entry and detainer, where the rental value does not exceed twenty-five dollars per month, and where the whole amount of damages claimed does not exceed two hundred dollars.⁸ Under the former constitution jurisdiction in such cases was conferred upon the county courts exclusively.⁹ In Nebraska, county courts have jurisdiction in actions of this character.¹⁰ In Illinois, circuit courts have both

original and appellate jurisdiction of such actions.¹¹ The territorial jurisdiction of justices of the peace in actions of forcible entry and detainer is held to be coextensive with their respective counties.¹²

1 See *Welden v. Schlosser*, 74 Ala. 355; *Wright v. Hurt*, 92 Ala. 591; *Dysart v. Enslow*, 7 Okla. 386; *McClain v. Jones*, 60 Kan. 639; *Dicks v. Hatch*, 10 Iowa, 380.

2 *Beck v. Glenn*, 69 Ala. 121.

3 *Beck v. Glenn*, 69 Ala. 121; *Ward v. Lewis*, 1 Stew. 26; *Hannigan v. Mossler*, 44 Ill. App. 117.

4 *Webb v. Carlisle*, 65 Ala. 313.

5 *Bridges v. Branam*, 133 Ind. 488; *Jordan v. Walker*, 56 Iowa, 686.

6 *Pettit v. Black*, 13 Neb. 142; *Smith v. Kaiser*, 17 Neb. 184; *Jenkins v. Jeffrey*, 3 Wyo. 669.

7 *Klopper v. Keller*, 1 Colo. 410; *Murry v. Burris*, 6 Dak. Ter. 170, 178; *Dickinson v. Maguire*, 9 Cal. 47; *Witz v. Haynes*, 43 Ind. 470.

8 Cal. Const., art. 6, sec. 11.

9 See *Caulfield v. Stevens*, 28 Cal. 118; *Brummagin v. Spencer*, 29 Cal. 662; *Stoppelkamp v. Mangeot*, 42 Cal. 324; *Johnson v. Chely*, 43 Cal. 304.

10 *Uhl v. Pence*, 11 Neb. 316.

11 *Davis v. Hamilton*, 53 Ill. App. 94; and see *Burns v. Nash*, 23 Ill. App. 552. See, also, as to jurisdiction in such cases: *Kenney v. Sweeney*, 14 R. I. 581; *State v. Gardner*, 22 Fla. 14.

12 *Reynolds v. Larkins*, 10 Colo. 126. See *Billings v. Chapin*, 2 Ill. App. 555; *Sanchez v. Candelaria*, 5 N. Mex. 400.

§ 504. Demand for Possession.

In some jurisdictions an action of forcible entry or detainer cannot be maintained without a previous notice to quit or demand for posses-

sion.¹ But a distinction in this respect has been made between an action for a forcible and illegal entry, and an action for unlawful detainer after a peaceable and lawful entry.² And it is generally held that in the former case the plaintiff need not make a demand for the possession of the premises before commencing his action.³ In Alabama, it is of the essence of an unlawful detainer that possession is refused on demand in writing.⁴ The demand of possession is not required to be in any particular form, and technical accuracy is not required.⁵

1 See *Stuller v. Sparks*, 51 Kan. 19; *Douglass v. Whitaker*, 32 Kan. 381; *Tivnen v. Monahan*, 76 Cal. 131.

2 See *Grice v. Ferguson*, 1 Stew. 36; *Warren v. Kelly*, 17 Tex. 544; *Miller v. Sparks*, 4 Colo. 303.

3 *Farncomb v. Stern*, 18 Colo. 279; *Silvey v. Summer*, 61 Mo. 253.

4 *Spear v. Lomax*, 42 Ala. 576; and see *Littleton v. Clayton*, 77 Ala. 571; *King v. Bolling*, 77 Ala. 594.

5 See *Farr v. Farr*, 21 Ark. 573; *Ullman v. Herzberg*, 91 Ala. 458; *Vennum v. Vennum*, 56 Ill. 430; *Douglass v. Anderson*, 32 Kan. 353; *Newman v. Bird*, 60 Cal. 372.

§ 505. Complaint—Sufficiency.

It is said that the proceedings in forcible entry and detainer have never been held to the test of strict technical precision and regularity.¹ In California, the complaint must show that the plaintiff was in actual possession of the property, as distinguished from the constructive possession

thereof, when it was invaded by the defendant, and if it merely alleges that the plaintiff was in the peaceable and undisturbed possession, it is defective upon special demurrer for uncertainty, if not upon general demurrer.² In New York, a strict compliance with the statute was held to be required.³ And where the petition does not allege, nor the proofs show, that the petitioner had any interest whatever in the premises in suit, the proceedings should be dismissed.⁴ A complaint which accurately describes the premises, and distinctly charges an unlawful and forcible detention thereof by the defendant, is sufficient under the Nebraska statute.⁵ The complaint is sufficient if it is in the language of the statute.⁶ Any description by which the premises can be readily identified and located is held sufficient.⁷ Under the Georgia statute the complaint need not describe the manner, means, or nature of the force used. It is sufficient to allege that the defendant forcibly entered upon the land described, of which the plaintiff was in possession, and forcibly detained such land from him.⁸ A complaint in an action of forcible entry and detainer is held to be fatally defective which alleges that the plaintiff is the owner and in possession of the premises, since, in such case, the plaintiff can have no cause of action against the defendant for an entry and detention thereof.⁹ And it is held in the same case that a description of the

property as "a portion of said premises being about thirty acres of and in the southwestern portion of said quarter section," is insufficient within the contemplation of the Kansas statute.¹⁰ In some jurisdictions a count for forcible entry and detainer and a count for unlawful detainer may be united in the same complaint.¹¹ But they should be separately stated.¹² Under the provisions of the California statute, where a complaint charges both a forcible entry and a forcible detainer, a finding that the plaintiff was the owner and in possession of the property should be construed to import that he was in the actual and peaceable possession thereof at the time when he was forcibly removed therefrom, and that he was entitled to the possession at the time of the forcible detainer, and the finding being sufficient to support a judgment for forcible detainer, it is immaterial whether it is sufficient to support a judgment upon the ground of forcible entry.¹³ A count for a cause of action, under the California forcible entry and unlawful detainer act of 1866, could not be joined in the same action with a count for holding over as a tenant of the plaintiff, contrary to the terms of a lease.¹⁴ The fact that a complaint in unlawful detainer under the Colorado statute alleges a forcible detainer, and also a demand for possession when no demand was necessary, does not affect the sufficiency of the complaint, or render it obnoxious to the objection

that two causes of action are stated in one count.¹⁵ In some of the states the complaint in a forcible entry and detainer suit is not required to be verified.¹⁶ And, when verification is required, an affidavit which avers that the complaint is true in substance and fact, is held sufficient.¹⁷ In an action of unlawful detainer for the possession of unsurveyed government land, the complaint must allege title in the plaintiff, that plaintiff was entitled to the possession at the time the defendant entered, and when demand was made upon him for the possession, that defendant unlawfully withheld the premises, and that service of demand for possession had been made upon him. The omission of these material allegations render the complaint fatally defective.¹⁸ The complaint itself must disclose enough upon its face to give the court jurisdiction without a resort to parol testimony.¹⁹

1 Belcher v. Barrett, 4 Met. 307; Houghton v. Potter, 23 N. J. L. 338; Silvey v. Summer, 61 Mo. 253.

2 Knowles v. Crocker Estate Co., 125 Cal. 264; and see Ely v. Yore, 71 Cal. 130; Voll v. Hollis, 60 Cal. 569.

3 People v. Field, 58 Barb. 270; 1 Lans. 222.

4 Dougherty v. McMillan, 55 N. Y. Supp. 616; 25 Misc. Rep. 782; Potter v. Society, 52 N. Y. Supp. 294; 23 Misc. Rep. 671.

5 Moore v. Parker (Neb. Sup. Ct.), 80 N. W. Rep. 43; and see Sanchez v. Luna, 1 N. Mex. 238.

6 Blachford v. Frenzer, 44 Neb. 829; and see Brown v. Burdick, 25 Ohio St. 260; McAlpin v. Purse, 86 Ga. 271.

7 *Cairo etc. R. R. Co. v. Ferry Co.*, 82 Ill. 230; *Stillman v. Palis*, 134 Ill. 532.

8 *McAlpin v. Purse*, 86 Ga. 271. See, as to allegations of force: *Ferguson v. Carter*, 40 Ala. 607; *Holland v. Green*, 62 Cal. 67.

9 *Schuster v. Gray* (Kan. Ct. App.), 55 Pac. Rep. 489.

10 *Schuster v. Gray* (Kan. Ct. App.), 55 Pac. Rep. 489; and see *Klingensmith v. Faulkner*, 84 Ind. 331; *Schaumtoeffel v. Belm*, 77 Ill. 567.

11 See *Littleton v. Clayton*, 77 Ala. 571.

12 *Shelby v. Houston*, 38 Cal. 419; *Valencia v. Couch*, 32 Cal. 339, 91 Am. Dec. 589.

13 *Adams v. Helbing*, 107 Cal. 298. Compare *Castro v. Tewksbury*, 69 Cal. 562; *Knowles v. Crocker Estate Co.*, 125 Cal. 264.

14 *Polack v. Shafer*, 46 Cal. 270.

15 *Miller v. Sparks*, 4 Colo. 303.

16 So in Illinois: *Patterson v. Graham*, 140 Ill. 531.

17 *Snyder v. Parker*, 75 Mo. App. 529. Compare *Newman v. Bird*, 60 Cal. 372; *Treat v. Bent*, 51 Me. 478.

18 *Barnes v. Cox*, 12 Utah, 47. See further, in illustration of sufficiency of complaint in such actions, *Lowman v. West*, 8 Wash. 355; *Laffey v. Chapman*, 9 Colo. 304; *McKissick v. Ashby*, 98 Cal. 422.

19 *Treat v. Bent*, 51 Me. 478.

§ 506. Defenses.

The plea of "not guilty," in a forcible entry and detainer suit, requires the plaintiff to prove every fact necessary to entitle him to recover.¹ It is a defense to this action that the defendant was in actual possession.² But it is well settled that controverted questions of title cannot be tried or determined in this form of action, and the defendant cannot plead title in himself, or in

third persons, to defeat a recovery.³ And one who has entered upon vacant or unoccupied lands without right or title cannot show in defense to the action that he acquired a tax deed to the property after taking possession.⁴ So the fact that a landlord has been deprived of his title since the making of a lease by the foreclosure of a mortgage previously executed is not available as a defense to an action of unlawful detainer, although the tenant has attorned to the purchaser at the foreclosure sale.⁵ Setoff or counterclaim is not allowable as a defense in an action of forcible entry and detainer.⁶ And the fact that a landlord has violated a covenant in his lease to keep the demised premises in good repair, and thereby damage has resulted to the tenant, is no defense in an action by the former against the latter to have restitution of the premises for nonpayment of rent.⁷ The defense of fraud in the procurement of a deed purporting to convey the premises in controversy to the plaintiff, is not available as a defense.⁸ The question of fraud in the procurement of a deed is properly triable in a court of equity only.⁹ So, in an action of forcible entry and detainer for possession under a purchase at a foreclosure of a deed of trust, the defendant cannot raise the question of the validity of the trust deed under a simple answer to the action of forcible entry and detainer.¹⁰ Nor can

the defendant in such action defend upon the ground that his entry and the detention were in the capacity of agent, and not in his own right, since the act of forcible entry or unlawful detainer is a tort, and an agent is personally liable for his own torts.¹¹ But a defense that the party was in possession under a contract with the plaintiff to purchase the land, with the terms of which he had complied on his part, is deemed good.¹² If suit be commenced before the termination of the tenancy under which possession was taken, the plaintiff must fail.¹³ In an action of unlawful detainer against a tenant for holding over, if the tenant is able to show that he did not enter under the lease, but that, being already in possession, he was induced to accept a lease from the plaintiff, through deception and imposition practiced upon him, this state of facts destroys the relation of landlord and tenant, and constitutes a good defense to the action.¹⁴ So, in a forcible entry and detainer suit, it is competent for the defendant to prove that prior to the entry the plaintiff disclaimed to him any interest or claim in the premises, and, if proven, such fact will constitute a defense to the action.¹⁵ The fact that premises were rented for immoral purposes is no defense to a proceeding in forcible detainer which is rather in disaffirmance of any intention to devote the premises to improper purposes.¹⁶

1 Galligher v. Connell, 23 Neb. 391; McGuire v. Cook, 13 Ark. 448; Raymond v. Bell, 18 Conn. 81; Burns v. Nash, 23 Ill. App. 552.

2 Doty v. Burdick, 83 Ill. 473; Haller v. Blaco, 14 Neb. 195; Lee v. Stiles, 21 Conn. 501; Alderman v. Boeken, 25 Kan. 658; and see Flint v. Lovdal, 122 Cal. 551.

3 See Thomasson v. Wilson, 146 Ill. 384; Knowles v. Ogletree, 96 Ala. 555; McLean v. Spratt, 20 Fla. 515; Jenkins v. Jeffrey, 3 Wyo. 669; Felton v. Millard, 81 Cal. 540; and see sec. 501, ante.

4 Palmer v. Frank, 169 Ill. 90.

5 Pugh v. Davis, 103 Ala. 316, 49 Am. St. Rep. 30.

6 Warburton v. Doble, 38 Cal. 619; Kelly v. Teague, 63 Cal. 68; Haynes v. Investment Co., 35 Neb. 766; Ralph v. Lomer, 3 Wash. 411; Phillips v. Port Townsend Lodge, 8 Wash. 533.

7 Peterson v. Kreuger, 67 Minn. 449; and see, to same effect, Finney v. Cist, 34 Mo. 303, 84 Am. Dec. 82; Borden v. Sackett, 113 Mass. 214; Van Every v. Ogg, 59 Cal. 563. See Keating v. Springer, 146 Ill. 481, 37 Am. St. Rep. 175.

8 Dysart v. Enslow, 7 Okla. 386; Windett v. Hurlbut, 115 Ill. 403; Gale v. Eckhart, 107 Mich. 465; and see Simons v. Marshall, 3 G. Greene, 502.

9 Id.; Paldi v. Paldi, 95 Mich. 410; Moran v. Moran, 106 Mich. 8, 58 Am. St. Rep. 462.

10 Smith v. Soper, 12 Colo. App. 264.

11 Luling v. Sheppard, 112 Ala. 588; and see Mayer v. Building Co., 104 Ala. 611, 53 Am. St. Rep. 88.

12 Oleson v. Hendrichson, 12 Iowa, 222; Jordan v. Walker, 52 Iowa, 647; Hall v. Jackson, 77 Iowa, 201; Reeder v. Bell, 7 Bush, 255.

13 Rainey v. Capps, 22 Ala. 288; Robinson v. Allison, 97 Ala. 596; Sweetser v. McKenney, 65 Me. 225; Patterson v. Graham, 40 Ill. App. 399; Stevenson v. Brodahl, 49 Neb. 703; King v. Duncan, 62 Ark. 588; Cheney v. Newberry, 67 Cal. 125.

14 Johnson v. Chely, 43 Cal. 299; and so, to same effect, Steele v. Bond, 28 Minn. 267; Nightingale v. Barrens, 47 Wis. 389; People v. Howlett, 76 N. Y. 574;

Loring v. Harmon, 84 Mo. 127; McLeod v. Sharp, 53 Ill. App. 406. Compare Knowles v. Murphy, 107 Cal. 114.

15 Dudley v. Lee, 39 Ill. 339.

16 Toby v. Schultz, 51 Ill. App. 487.

§ 507. Evidence.

On a complaint of forcible entry and detainer, the burden of proof is on the complainant, and it is incumbent on him to prove that his possession has been invaded by the acts complained of.¹ If the evidence does not show that the entry was forcible, but there is an entire absence of force, the action must fail.² In a complaint so framed, the forcible entry is held to be the gist of the action.³ In an action of unlawful detainer, evidence that the plaintiff had conveyed an interest in land to which he makes no claim is held to be irrelevant.⁴

1 Stiles v. Homer, 21 Conn. 506.

2 Livingston v. Webster, 26 Fla. 325; and see McMinn v. Bliss, 31 Cal. 122; sec. 500, ante.

3 Peacock v. Leonard, 8 Nev. 84.

4 Anderson v. Thomas (Ct. App., Ind. Ter.), 47 S. W. Rep. 301.

§ 508. Verdict.

Strict technical precision and regularity are not required in verdicts under forcible entry and detainer statutes.¹ The defendant may be found guilty as to part and not guilty of the balance of the charge laid in the plaintiff's complaint.² But a verdict which finds the defendant not guilty as

to the premises described in the complaint, and that the plaintiff is entitled to the possession of certain premises described in the verdict, but do not find the defendant guilty as to the latter premises, will not sustain a judgment for the plaintiff for restitution and costs.³ In forcible detainer, a verdict is defective which fails to find that the defendant detained the property.⁴ It must state that the premises are detained by force.⁵ The verdict must be signed by all the jurors.⁶ A general verdict finds every fact necessary to authorize it, and it is, therefore, unnecessary for a verdict in unlawful detainer to distinctly mention the withholding of the possession at the date of the institution of the suit.⁷

1 Belcher v. Barrett, 4 Met. (Ky.) 307; Case v. Roberts, 4 Dana, 596.

2 Miller v. Turney, 13 Ark. 385.

3 Chapman v. Knowles, 34 Ill. App. 558.

4 McCleary v. Crowley, 22 Mont. 245.

5 Boxley v. Collins, 4 Blackf. 320; Bull v. Olcott, 2 Root, 472. But see Smith v. Killeck, 5 Gilm. 293.

6 Ward v. Crane, 3 Blackf. 393.

7 Gorman v. Steed, 1 W. Va. 1; and see Raymond v. Bell, 18 Conn. 81.

§ 509. Judgment.

Under the statutes of most of the states the action of forcible entry and detainer is purely a civil remedy;¹ and the only judgment that can be rendered is, that the plaintiff have restitution of the premises of which he has been unjustly

deprived;² or that the plaintiff's action be dismissed and that the defendant go hence without day.³ The Illinois statute makes no provision for rendering judgment in such action for either rent or damages, and they cannot be allowed therein.⁴ So, a judgment entered by confession under a power of attorney and cognovit in a forcible detainer suit, is unauthorized by law in Illinois, and is void.⁵ In some jurisdictions judgment may be given for damages.⁶ If the complaint contains a sufficient description of the premises, an insufficient description in the judgment entry, aided by a reference to the antecedent description in the record, is also sufficient.⁷ But the judgment itself should describe the property with certainty.⁸ Under the Illinois statute, whether the judgment and execution should be for the whole or only a part of the premises claimed, if either, depends, not on the extent of the defendant's actual possession, but on the extent of the plaintiff's right of possession, and the fact that the defendant was in possession of only a part of the premises claimed cannot be urged as an objection to a judgment for the whole of the premises.⁹ The judgment in forcible entry and detainer is held to be conclusive only as to the right of possession, and, in a certain class of cases, as to the existence of the relation of landlord and tenant between the parties, and as to the tenant's wrongful holding over.¹⁰ It is accord-

ingly held that such judgment cannot operate as *res adjudicata*, so as to debar the tenant from recouping, in a subsequent action for the recovery of the rent of the demised premises, the damages which he has sustained through the landlord's breach of the covenants in the lease.¹¹ It is also held that a judgment in such action decreeing restitution of the premises is no bar to a subsequent action in which the plaintiff seeks to determine the ownership, as between him and the party who was awarded such restitution;¹² nor, generally, to any action involving any other question except the right to the immediate possession of the premises.¹³

1 See sec. 496, ante.

2 *Robinson v. Crummer*, 5 Gilm. 218.

3 *Stover v. Hazelbaker*, 42 Neb. 393.

4 *Brush v. Fowler*, 36 Ill. 53, 85 Am. Dec. 382; *Shunick v. Thompson*, 25 Ill. App. 619.

5 *French v. Miller*, 126 Ill. 611, 9 Am. St. Rep. 651.

6 See *Caulfield v. Stevens*, 28 Cal. 118; *Warburton v. Doble*, 38 Cal. 619; *Murry v. Burris*, 6 Dak. Ter. 170; *Sturgeon v. Hitchens*, 22 Ind. 107.

7 *House v. Camp*, 32 Ala. 541.

8 *Norris v. Pierce*, 47 Ill. App. 463.

9 *Hardin v. County of Sangamon*, 71 Ill. App. 103.

10 *Norwood v. Kirby*, 70 Ala. 397; *Keating v. Springer*, 146 Ill. 481, 37 Am. St. Rep. 175; *Necklace v. West*, 33 Ark. 682.

11 *Keating v. Springer*, 146 Ill. 481, 37 Am. St. Rep. 175. Compare sec. 506, ante.

12 *Redden v. Tefft*, 48 Kan. 302.

13 *Deisher v. Gehre*, 45 Kan. 583; *Cochran v. Fogler*, 116 Ill. 194; *Robinson v. Allison*, 97 Ala. 596; *Fish v.*

Benson, 71 Cal. 428; Dale v. Doddridge, 9 Neb. 138; Harvie v. Turner, 46 Mo. 444.

§ 510. Damages, etc.

In California, the recovery of rents and damages is incidental to the recovery of possession;¹ and need not be averred in the complaint.² But the plaintiff in an action of unlawful detainer is not entitled to the double damages given by the Washington statute, unless he specially claims them in his complaint. The prayer of the complaint should govern the recovery in such cases.³ The Michigan statute giving treble damages does not apply to a mere trespass, however wrongful, and a declaration upon the statute for treble damages will not support a judgment upon the verdict of single damages, as for a trespass at common law.⁴ Double the annual rent, given by the Alabama statute as damages against a tenant holding over, is held to be merely an incident to the recovery of possession, and a recovery cannot be had in justice's court for an amount in excess of his jurisdiction. Nor can a greater recovery be had in the higher court on appeal, except for rent pending the appeal when a supersedeas bond has been given.⁵

1 Caulfield v. Stevens, 28 Cal. 118.

2 Holmes v. Horber, 21 Cal. 55; Tewksbury v. O'Connell, 25 Cal. 262; Armstrong v. Paul, 1 Nev. 141.

3 Hall Furniture Co. v. Wilbur, 4 Wash. 644; Gaffney v. Megrath, 11 Wash. 456; Hart v. Pratt, 19 Wash. 560. See, also, Moore v. Dixon, 50 Mo. 424.

4 *Shaw v. Hoffman*, 25 Mich. 162; and see *Willard v. Warren*, 17 Wend. 257.

5 *Giddens v. Bolling*, 92 Ala. 586; *Lykes v. Schwarz*, 91 Ala. 461.

§ 511. Restitution.

A writ of restitution will be awarded in an action of forcible entry and detainer, not only against the defendant, but against anyone holding under him, although not a party to the action.¹ The defendant, after judgment, cannot, by transferring the possession to a stranger, prevent the execution of the writ.² If a plaintiff, in such action, recovers judgment, and is placed in possession by writ of restitution, and the judgment is afterward reversed upon appeal, the lower court should restore the defendant to possession.³ But if the defendant in such case does not lose possession of the property under or through the judgment, he is not entitled to be restored to possession as against third parties who have ousted him during the pendency of the action.⁴ It is a general rule to award writs of re-restitution upon quashing proceedings in forcible entry and detainer, and the courts, upon a motion for this purpose, will not suffer the merits of the controversy to be examined into.⁵ But the writ is not demandable as a matter of strict right, and where the case itself shows that its issue would work manifest oppression and injustice, it will be refused.⁶ As regards the service of the writ of

restitution, if the defendant, acquiescing in its service, yields up the possession, and it is delivered to the plaintiff, or his agent, it is a good service. But without such submission and acquiescence on the part of the defendant, his actual removal will be necessary.⁷ And an officer armed with the writ can enter forcibly, in order to execute it, and, having so entered, it is his duty to remove the personal property, doing as little damage as possible, and no more than is necessary to effect the purpose, and which would be the natural consequence of a hasty removal. By the writ, the landlord or owner is to be put in full possession of the premises only, divested of such property as may be found therein.⁸ Should the officer wantonly injure the chattel property, he would be liable to the extent of the injury.⁹

1 *Fremont v. Crippen*, 10 Cal. 212, 70 Am. Dec. 711, and note; and see *Danforth v. Stratton*, 77 Me. 200; *Ennis v. Lamb*, 10 Ill. App. 447.

2 *Fremont v. Crippen*, 10 Cal. 212, 70 Am. Dec. 711; *Sampson v. Ohleyer*, 22 Cal. 207.

3 *Polack v. Shafer*, 46 Cal. 270; *Kennedy v. Horner*, 19 Cal. 374; *Wright v. Hurt*, 92 Ala. 591.

4 *Bowers v. Cherokee Bob*, 46 Cal. 279.

5 *Watson v. Trustees etc.*, 2 Jones, 211; and see *Commonwealth v. Bigelow*, 3 Pick. 31; *Perry v. Tupper*, 71 N. C. 385.

6 *Watson v. Trustees etc.*, 2 Jones, 211.

7 *Smith v. White*, 5 Dana, 376.

8 *Miller v. White*, 80 Ill. 580; *Lee Chuck v. Quan Wo Chong Co.*, 81 Cal. 222, 15 Am. St. Rep. 50; and see *Witbeck v. Van Rensselaer*, 64 N. Y. 27.

9 *Miller v. White*, 80 Ill. 580; and see *Page v. De Puy*, 40 Ill. 506.

CHAPTER XXXIV.

QUIETING TITLE.

- § 512. Nature of the remedy.
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§ 512. Nature of the Remedy.

Jurisdiction to remove a cloud on title and quiet the possession to real property is said to

take its rise in the doctrine of *quia timet*, in order to give repose and peace to the party in possession by virtue of a rightful title, against him who might vex and harass with suits, after the right had been fairly tested in a court of law, or against evidence of title fraudulently obtained.¹ Briefly stated, the object of a suit to remove a cloud upon title and to quiet the possession of real estate is to protect the owner of the legal title from being disturbed in his possession, or harassed by suits in regard to that title.² The suit is in substance a bill of peace, of the kind which lies where the right of the plaintiff to real property has been unsuccessfully assailed in different actions, and is liable to further actions of the same character, and the bill is brought to end the controversy.³ In many of the states, as will be hereafter seen, statutes have been enacted extending the scope of the remedy, and authorizing it in cases where previously bills of peace would not lie.⁴

1 *Boyd v. Thornton*, 13 Smedes & M. 344; *Huntington v. Allen*, 44 Miss. 654; *Sheppard v. Nixon*, 43 N. J. Eq. 627.

2 *Frost v. Spitley*, 121 U. S. 556; *Phelps v. Harris*, 101 U. S. 370; *Corey v. Schuster*, 44 Neb. 269; *Livingston v. Hall*, 73 Md. 386.

3 *Sharon v. Tucker*, 144 U. S. 533, 543; and see *Holland v. Challen*, 110 U. S. 15, 19; *Curtis v. Sutter*, 15 Cal. 259; *Douglass v. McCoy*, 5 Ohio, 522; *Porter v. Reed*, 123 Mo. 587; *Hartwell v. Life Ins. Co.*, 50 Hun, 497, 501; *Galveston etc. R. R. Co. v. Dowe*, 70 Tex. 5; *Wehrman v. Conklin*, 155 U. S. 314, 322.

4 See sec. 516, post.

§ 513. What Constitutes Cloud on Title.

Briefly defined, a cloud upon title is a title, or encumbrance, apparently valid, but in fact invalid.¹ It is something which shows some prima facie right of a third person to the land.² It is the semblance of a title, either legal or equitable, or a claim of an interest in lands, appearing in some legal form, but which is, in fact, unfounded, or which it may be inequitable to enforce.³ To constitute a cloud, the deed or other instrument must be one that is regular and valid on its face, but is in fact irregular and void from circumstances which have to be proved by extrinsic evidence.⁴ In other words, when a claim to an interest in or lien upon land appears to be valid upon the face of the record, and its defect can only be made to appear by extrinsic evidence, it constitutes a cloud upon the title of the owner, which he is entitled to have removed.⁵ It is held to be settled by a long line of decisions in California that any claim of title which, if asserted, would drive the other party to the production of his own title to establish a defense, constitutes a cloud which a court of equity may be called upon to remove and dissipate.⁶ On the other hand, if a title be void upon its face, if it be a mere nullity, so that an action based upon it would fall of its own weight, it does not constitute a cloud, and an action to remove it cannot be maintained in the absence of special circumstances entitling the

party to relief.⁷ And it is said that the various definitions all agree, in effect, that in order to constitute a cloud there must at the least be something which can be pointed out, and which has some appearance of furnishing a valid objection to the complainant's title.⁸ Mere apprehension as to the validity of a title, or even oral assertions of a hostile claim, will not sustain a bill to quiet the title.⁹ But it has been held by the supreme court of Michigan that if the title, sole and absolute in fee, is really in the person moving against the cloud, the density of the cloud can make no difference in the right to have it removed. Anything that has a tendency, even in a slight degree, to cast doubt upon the owner's title, and to stand in the way of a full and free exercise of his ownership, is a cloud upon his title which the law should recognize and remove.¹⁰

1 *Bissell v. Kellogg*, 60 Barb. 629; and see *Rea v. Longstreet*, 54 Ala. 294; *Lytle v. Sandefur*, 93 Ala. 396, 399.

2 *Waterbury Sav. Bank v. Lawler*, 46 Conn. 245; *Welles v. Rhodes*, 59 Conn. 498.

3 *Rigdon v. Shirk*, 127 Ill. 411; *Shults v. Shults*, 159 Ill. 654, 50 Am. St. Rep. 188.

4 *Murphy v. Wilmington*, 6 Houst. 108, 134, 22 Am. St. Rep. 345; *Heywood v. Buffalo*, 14 N. Y. 539; *Lehman v. Roberts*, 86 N. Y. 232; *Welden v. Stickney*, 1 App. Cas. (D. C.) 343.

5 *Ormsby v. Ottman*, 85 Fed. Rep. 492; *Crooke v. Andrews*, 40 N. Y. 547.

6 *Lick v. Ray*, 43 Cal. 83, 88; *Pixley v. Huggins*, 15 Cal. 133; approved in *Engelbach v. Simpson*, 12 Tex. Civ. App. 195; *Goldberg v. Taylor*, 2 Utah, 491; *West*

Portland etc. Assn. v. Lownsdale, 9 Saw. 118, 17 Fed. Rep. 618; Benner v. Kendall, 21 Fla. 584; Thompson v. Iron Co., 91 Ga. 538, 540.

7 Lick v. Ray, 43 Cal. 83, 88; also, Sloan v. Sloan, 25 Fla. 53, 67; Barnes v. Mayo, 19 Fla. 542; Reyes v. Middleton, 36 Fla. 99, 51 Am. St. Rep. 17; Taylor v. Fisk, 94 Fed. Rep. 242.

8 Gilman v. Gilman, 171 Mass. 47; and see Detroit v. Martin, 34 Mich. 170, 22 Am. Rep. 512; Welden v. Stickney, 1 App. Cas. (D. C.) 343.

9 March v. England, 65 Ala. 275, 284; Borst v. Simpson, 90 Ala. 373, 376; Cashman v. Cashman, 50 Mo. App. 663; Miles v. Strong, 62 Conn. 95, 101; Parker v. Shannon, 121 Ill. 452; Sulphur Mines Co. v. Boswell, 94 Va. 480.

10 Whitney v. Port Huron, 88 Mich. 268, 26 Am. St. Rep. 291; and see Ward v. Dewey, 16 N. Y. 519, 531; Bayha v. Taylor, 36 Mo. App. 427; Fulgham v. Pate, 77 Ga. 454.

§ 514. Same—Instances.

It is held that every deed from the same source through which the plaintiff derives his real property must, if valid on its face, necessarily cast a cloud upon the title.¹ Where a sheriff's deed would contain such prima facie evidence of title in the purchaser that, to avoid it, proof of extraneous facts by the owner of the land would be necessary, it would be a cloud upon the title.² A sale by an administrator of land once the property of the intestate, but sold during his lifetime, will cast a cloud on the intestate's prior grantee's title.³ So where the husband sold the wife's separate property, and it was mortgaged by the vendee, the mortgage was held to be a cloud on the

wife's property.⁴ And a sale of the wife's separate property on execution for a debt of the husband was held to be a cloud on her title.⁵ A written proposition for the sale of lands, not accepted within a reasonable time, but afterward accepted and placed upon record, was held to be a cloud upon the title of the vendor.⁶ So a bond for a deed, properly witnessed and acknowledged and recorded, creates a lien upon the land, and casts a cloud or shadow upon the obligor's title, which he is entitled to have removed.⁷ A cloud on title may be created by a registered mortgage admitted to be a forgery.⁸ A patent erroneously issued to a pre-emptor was held to be a cloud on a railway's title to public lands.⁹ An illegal tax deed is a cloud that equity will remove when by statute it is made prima facie evidence of the regularity of the proceedings.¹⁰ So an invalid street assessment constitutes a cloud upon title which the property owner is entitled to have removed;¹¹ and this is held to be so, although the same matters may be asserted as a defense to an action for the enforcement of the assessment.¹² But if the invalidity of the assessment complained of is apparent on the record of the proceedings by which it was laid, and requires no proof aliunde to show it, then such assessment does not cast a cloud upon titles, and the remedy of the owner of the land is in a court of law.¹³ A patent to swamp

lands, void on its face, is no cloud.¹⁴ Nor can a tax deed, void upon its face, cast a cloud upon the title of the owner of the land.¹⁵ So a sheriff's sale of real property by virtue of an execution, void upon its face, will not cast a cloud upon the title.¹⁶ The levy of an attachment against A upon the land of B gives no lien thereon, and creates no cloud upon B's title.¹⁷ So an administrator's deed, made under the decree of a court having no jurisdiction, is not a cloud.¹⁸ And it is asserted as a general principle, well sustained by authority, that where the instrument or proceeding complained of as constituting a cloud upon title is void upon its face, or where the instrument is not void upon its face, but the party claiming under it must, in order to recover upon it, necessarily offer evidence that will inevitably show its invalidity and destroy its effect, such instrument is not a cloud upon title within the legal definition of the term.¹⁹ It is held in some jurisdictions that the clouds which courts of equity will remove are instruments or proceedings in writing which appear upon the records, and thereby cast doubts upon the validity of the record title.²⁰ It is accordingly held that an unrecorded survey, constituting no part of the chain of title, is not sufficient.²¹ A paper signed by A and recorded in the registry of deeds, giving notice that certain real estate held by B is claimed to be held

subject to a trust in favor of A, and that A will dispute any title that B may attempt to make, does not constitute a cloud upon B's title.²² But it is held that equitable relief may be granted for the removal from a homestead of the apparent lien of a judgment on the theory that such lien, though only apparent, is a cloud upon the owner's title.²³ Under a statute authorizing an action to quiet title against anyone claiming an interest in land adverse to the owner, the action will lie to remove a street assessment as a cloud, although the assessment is apparently barred by the statute of limitations.²⁴

1 *Pixley v. Huggins*, 15 Cal. 127.

2 *Englund v. Lewis*, 25 Cal. 337; *Talieferro v. Barnett*, 37 Ark. 515; and see, also, *Stout v. Cook*, 37 Ill. 283; *Budd v. Long*, 13 Fla. 309; *Schuyler v. Broughton*, 65 Cal. 253; *Grigsby v. Schwarz*, 82 Cal. 280; *Marriner v. Smith*, 27 Cal. 653; *Porter v. Pico*, 55 Cal. 176; *Coolidge v. Forward*, 11 Or. 122; *Linnell v. Battey*, 17 R. I. 243.

3 *Thompson v. Lynch*, 29 Cal. 189.

4 *Ramsdell v. Fuller*, 28 Cal. 42, 87 Am. Dec. 105.

5 *Roe v. Dailey*, 1 Posey, 252.

6 *Larmon v. Jordan*, 56 Ill. 204.

7 *Dahl v. Pross*, 6 Minn. 89.

8 *Byerly v. Humphrey*, 95 N. C. 151; and see *Sullivan v. Finnegan*, 101 Mass. 447; *Bunce v. Gallagher*, 5 Blatchf. 481.

9 *Southern Pac. Co. v. Wiggs*, 14 Saw. 577, 43 Fed. Rep. 339; *Van Wyck v. Knevals*, 106 U. S. 370; and see *Southern Pac. Co. v. Stanley*, 49 Fed. Rep. 265.

10 *Rich v. Braxton*, 158 U. S. 375, 407; *Sloan v. Sloan*, 25 Fla. 53; and see *Tilton v. Oregon Co.*, 3 Saw. 26; *Langlois v. McCullom*, 181 Ill. 195.

11 *Richter v. New York*, 54 N. Y. Supp. 150, 24 Misc. Rep. 613; *Beaser v. Ashland*, 89 Wis. 28; *Horbach v. Omaha*, 54 Neb. 83; *Dietz v. Neenah*, 91 Wis. 422.

12 *Bolton v. Gilleran*, 105 Cal. 244, 45 Am. St. Rep. 33.

13 *Murphy v. Wilmington*, 6 Houst. 108, 22 Am. St. Rep. 304; *Wiggin v. Mayor etc.*, 9 Paige, 23; *Van Doren v. Mayor etc.*, 9 Paige, 389.

14 *People v. Center*, 66 Cal. 566; and see *Minto v. Delancy*, 7 Or. 344.

15 *Russ v. Crichton*, 117 Cal. 695; *San Francisco R. Co. v. Dinwiddie*, 8 Saw. 315; 13 Fed. Rep. 792.

16 *Davidson v. Seegar*, 15 Fla. 671.

17 *Eshleman v. Vineyard Co.*, 97 Cal. 670, 674; and see *Rea v. Longstreet*, 54 Ala. 293. Compare *Wetherell v. Eberle*, 123 Ill. 666, 5 Am. St. Rep. 574.

18 *Tyson v. Brown*, 64 Ala. 244; *Sloan v. Sloan*, 25 Fla. 53, 68.

19 *Sloan v. Sloan*, 25 Fla. 53; *Briggs v. Johnson*, 71 Me. 235; *Clark v. Insurance Co.*, 52 Mo. 272; and see sec. 513, ante.

20 *Sulphur Mines Co. v. Boswell*, 94 Va. 480.

21 *Sulphur Mines Co. v. Boswell*, 94 Va. 480; *Sulphur Mines Co. v. Thompson*, 93 Va. 293.

22 *Nickerson v. Loud*, 115 Mass. 94; and see, also, *First African M. E. Church v. Brown*, 147 Mass. 296; *Leeds v. Wheeler*, 157 Mass. 67; *Gilman v. Gilman*, 171 Mass. 46.

23 *Smith v. Newfeld*, 57 Neb. 660; and see *Smith v. Zimmerman*, 85 Wis. 542; *Ketchin v. McCarley*, 26 S. C. 1, 4 Am. St. Rep. 674; *Irwin v. Lewis*, 50 Miss. 363.

24 *Kinsman v. Spokane*, 20 Wash. 118, 72 Am. St. Rep. 24.

§ 515. Jurisdiction in Equity.

The jurisdiction of a court of equity to prevent and remove a cloud upon the title to realty is said to be founded in sound principles of right and justice, and is well established.¹ The juris-

diction of such court to remove clouds from title is an independent source or head of equitable jurisdiction, not requiring any accompaniment of fraud, accident, mistake, trust, or account, or any other basis of equitable intervention.² This jurisdiction is preventive as well as remedial, and equity will interfere to prevent a cloud from being cast upon title, upon the same principle that it will remove a cloud from title.³ But a court of equity will not entertain a suit to prevent a cloud upon title, unless it be made to appear that there is a determination on the part of the defendant to create the cloud, and it is not sufficient that the danger is merely speculative.⁴ So it is said that the jurisdiction to remove a cloud on title must be exercised cautiously, only in plain cases, and with much care, and not at all where the party has an adequate remedy at law.⁵ It is the established general rule that if the complainant has a plain, adequate, and complete remedy at law, a court of equity will not assume jurisdiction.⁶ The proper forum to try titles to land is a court of law, and this jurisdiction cannot be withdrawn at pleasure and transferred to a court of equity upon the pretense of removing clouds from title.⁷ And the fact that there may be two new trials in ejectment is held to be no ground for the interposition of equity to try titles to land.⁸ But a remedy at law by an action of eject-

ment is inadequate where a judgment would still leave the complainant's title clouded.⁹ And it has been held that where a deed is obtained by fraud, and is void, equity will set it aside as a cloud on title, although the party has a complete remedy at law by the action of ejectment.¹⁰ The objection that there exists an adequate remedy at law may be waived by failure to object in time. As where both parties by their pleadings claim title to the same land, and each asks to have his title quieted, it is too late after decree for the losing party to urge for the first time that the proper remedy was ejectment.¹¹

1 See *Pettit v. Shepherd*, 5 Paige, 493; *Key City Gas Light Co. v. Munsell*, 19 Iowa, 305; *Beverly v. Humphrey*, 95 N. C. 151; *Frost v. Spitley*, 121 U. S. 552.

2 *Dull's Appeal*, 113 Pa. St. 510; *Kennedy v. Kennedy*, 43 Pa. St. 417, 82 Am. Dec. 574; *Yonkers v. Warden*, 8 Pa. Sup. Ct. 395; *Standish v. Dow*, 21 Iowa, 363.

3 *Tucker v. Kenniston*, 47 N. H. 267, 93 Am. Dec. 425, and note; *Sneathen v. Sneathen*, 104 Mo. 201, 24 Am. St. Rep. 326; *Covey v. Schuster*, 44 Neb. 269; *Jones v. Nixon*, 102 Tenn. 95; *Lyon v. Alley*, 130 U. S. 177.

4 *Sanders v. Yonkers*, 63 N. Y. 489; *Clark v. Davenport*, 95 N. Y. 483; *Weed v. Roberts*, 49 N. Y. Supp. 366; 22 Misc. Rep. 46.

5 *Dull's Appeal*, 113 Pa. St. 510, 518; *Glazier v. Bailey*, 47 Miss. 395; *Alton etc. Ins. Co. v. Buckmaster*, 13 Ill. 201.

6 *Hughes v. Hannah*, 39 Fla. 365; *Lundy v. Lundy*, 131 Ill. 138; *Armstrong v. Connor*, 86 Ala. 350; *Whitney v. Stevens*, 97 Ill. 482; *Bryan v. Winburn*, 43 Ark. 28; *Scott v. Means*, 80 Ky. 460; *Peacock v. Stott*, 104 N. C. 154; *Russell v. Barstow*, 144 Mass. 130; *Rhode*

v. Hossler, 113 Mich. 56; Clouston v. Shearer, 99 Mass. 209; Mayse v. Gaddis, 2 App. Cas. (D. C.) 20; Walker v. Walker, 63 N. H. 321, 56 Am. Rep. 514; Frost v. Spitley, 121 U. S. 552.

7 Phelps v. Harris, 51 Miss. 789; Cozart v. Lyon, 91 N. C. 282; Weed v. Weed, 94 N. Y. 243; Miles v. Strong, 62 Conn. 95.

8 Blackwood v. Van Vleet, 11 Mich. 252.

9 La Coss v. Wadsworth, 56 Mich. 421; and see Eaton v. Trowbridge, 38 Mich. 454.

10 Moore v. Munn, 69 Ill. 591; and see Hodgen v. Guttery, 58 Ill. 431; Johnson v. Cooper, 2 Yerg. 524, 24 Am. Dec. 511; Maloney v. Finnegan, 38 Minn. 70.

11 Gregory v. Lancaster County Bank, 16 Neb. 411; Mollie v. Peters, 28 Neb. 670; and see to same effect, Culver v. Rodgers, 33 Ohio St. 537; Baumann v. Franse, 37 Neb. 807; Kitcherside v. Myers, 10 Or. 23.

§ 516. Statutory Extension of Jurisdiction.

Statutes have been enacted in many of the states extending the jurisdiction of a court of equity to all cases where a party in possession, and sometimes out of possession, seeks to clear up his title and remove any cloud caused by an outstanding deed or lien which he claims to be invalid, and the existence of which is a threat against his peaceable occupation of the land, and an obstacle to its sale, and these statutes have generally been held to be within the constitutional power of the legislature.¹ The action to quiet title under the statute is in the nature of a suit in equity, and the proceedings are governed by the same rules which control suits in equity to quiet title, unless otherwise expressly provided by statute.² A suit brought in a federal court under the statute

should be by bill in equity, and the pleadings and practice should conform as nearly as may be to the pleadings and practice in equity in the federal courts.³ The statutory remedy to quiet title provided by the statutes of Massachusetts, Maine, and Missouri, is said to be purely statutory, and to possess none of the features of an equitable suit for that purpose.⁴ The statute was designed to enable a party in actual possession of land, claiming it as his own, to compel a party out of possession, who also claimed to be the owner, to bring ejectment to settle the question between them.⁵ But the proceeding was never intended as a substitute for the action of ejectment.⁶ And is not exclusive of the ordinary equity jurisdiction.⁷ So, generally, the statutory form of procedure is in aid and not exclusive of the right to proceed in equity.⁸

1 See *Wehrman v. Conklin*, 155 U. S. 314; *Arndt v. Griggs*, 134 U. S. 316; *Ormsby v. Ottman*, 85 Fed. Rep. 492; *Sheppard v. Nixon*, 43 N. J. Eq. 627; *Webster v. Tuttle*, 83 Me. 271; *People v. Center*, 66 Cal. 551.

2 See *Benson v. Shotwell*, 87 Cal. 49; *Carlisle v. Tindall*, 49 Miss. 229; *Miller v. Davison*, 31 Iowa, 435.

3 *Rigelow v. Chatterton*, 51 Fed. Rep. 614; and see *Frost v. Spitley*, 121 U. S. 552; *Whitehead v. Shattuck*, 138 U. S. 146; *Bardon v. Improvement Co.*, 157 U. S. 327; *Perego v. Dodge*, 163 U. S. 160.

4 *Daudt v. Keen*, 124 Mo. 105; and see *Northcutt v. Eager*, 132 Mo. 265.

5 *Dyer v. Baumeister*, 87 Mo. 134.

6 *Dyer v. Krackauer*, 14 Mo. App. 39.

7 *Clousten v. Shearer*, 99 Mass. 209; *Hinckley v. Greany*, 118 Mass. 598; *Connecticut etc. Ins. Co. v.*

Smith, 117 Mo. 261, 38 Am. St. Rep. 656; Sneathen v. Sneathen, 104 Mo. 201, 24 Am. St. Rep. 326.

8 Gillis v. Downey, 85 Fed. Rep. 483; and see Greeley v. Lowe, 155 U. S. 75; Harding v. Guice, 80 Fed. Rep. 162.

§ 517. Title and Possession of Plaintiff.

Under the jurisdiction and practice in equity, independently of statute, a bill to remove a cloud upon title, and to quiet possession of real estate, cannot be maintained without clear proof of both possession and legal title in the plaintiff.¹ A person out of possession cannot maintain such bill, whether his title be legal or equitable, for, if his title is legal, his remedy at law, by action of ejectment, is plain, adequate, and complete, and, if his title is equitable, he must acquire the legal title, and then bring ejectment.² Nor, in this class of cases, is possession a fact to be presumed, but it must be affirmatively alleged and shown.³ And the court will not entertain a bill by a plaintiff who has only constructive, but not actual, possession.⁴ But the general rule will not be so applied by a court of equity as to aid in the perpetration of a wrong. And where the case presents other grounds of equitable jurisdiction, or the remedy at law is inadequate, the court will take jurisdiction, notwithstanding the defendant, and not the plaintiff, is in possession.⁵ Thus an action to quiet title may be maintained by a vendor out of possession, where the vendee in possession

will not permit it to be brought in his name though withholding the purchase money till the title is perfected.⁶ When the main object of the suit is to obtain partition of lands, and incidentally to cancel certain deeds as clouds upon the title of the lands sought to be partitioned, an averment that the complainant is in possession is unnecessary.⁷ So when by fraud or questionable contrivance or irregularity, the title of the owner of land has been wrested from him and converted to the use of another, he may bring suit to cancel the conveyance as a cloud on title, whether or not he is in the actual possession of the land. In such case a court of equity will grant relief, as otherwise a wrong would be without remedy.⁸ And it has been repeatedly held that possession is not essential to entitle a party to equitable relief against a cloud upon his title, where the title is merely equitable.⁹ And so if the land be wild and unoccupied.¹⁰ And by express statutory provision in many of the states a suit to quiet title, or to remove a cloud therefrom, may be maintained by a person whether in or out of possession;¹¹ and whether his title be a legal or an equitable one.¹² And it has been held that the actual possession and occupation of land under claim of ownership for any period is sufficient to enable the party in possession to maintain the action as against a trespasser or one who establishes

no title in himself.¹³ But other decisions are to the effect that one in possession, but having no legal or equitable title to the land, cannot maintain the action.¹⁴ It has also been held that a party who holds the legal title, but is out of possession, cannot ask the aid of equity to remove a cloud on his title, which has in it none of the elements of fraud, accident, or mistake, unless his title is perfectly clear and paramount to the supposed cloud, and he is not practically bringing ejectment in a court of equity.¹⁵ And it is held that a federal court will not entertain a suit to quiet title to land of which the defendant is in the actual possession, when the bill is filed, though such suit is authorized by a state statute.¹⁶ Under the Washington statute (Code Proc., sec. 539), an action will lie to recover the possession of realty and at the same time remove a cloud upon its title.¹⁷ It has generally been held that a claimant of land who takes and maintains forcible possession for the purpose of filing a bill to quiet his title, and to avoid a suit at law, cannot maintain his bill.¹⁸ In order to maintain the suit, he must be in the peaceable possession of the land in question.¹⁹ It has been held in other cases, however, that if the possession exists, it is immaterial how it was acquired, and that a possession obtained by trespass is sufficient for the purposes of the suit.²⁰ And it is held sufficient

if the plaintiff be in the actual possession of part of the land.²¹ And possession by the plaintiff through a duly authorized agent or a tenant is sufficient.²²

1 *Alexander v. Pendleton*, 8 Cranch, 462; *Orton v. Smith*, 18 How. 263; *Frost v. Spitley*, 121 U. S. 556; *Armitage v. Wickliffe*, 12 B. Mon. 494; *Campbell v. Disney*, 93 Ky. 41; *Packard v. Mining Co.*, 96 Ky. 249; *Weaver v. Arnold*, 15 R. I. 53; *Gould v. Sternburg*, 105 Ill. 488; *Moore v. Townshend*, 102 N. Y. 387; *Helden v. Hellen*, 80 Md. 616. 45 Am. St. Rep. 371, and note; *O'Hara v. Parker*, 27 Or. 156; *Moore v. McNutt*, 41 W. Va. 695.

2 *Fussell v. Gregg*, 113 U. S. 550; *United States v. Wilson*, 118 U. S. 86; *McCoy v. Johnson*, 70 Md. 490; *Livingston v. Hall*, 73 Md. 386; *Smith v. McConnell*, 17 Ill. 135, 63 Am. Dec. 341.

3 *Livingston v. Hall*, 73 Md. 386; *Sklower v. Abbott*, 19 Mont. 228.

4 *Carberry v. Railroad Co.*, 44 W. Va. 260; *O'Hara v. Parker*, 27 Or. 156; *Churchill v. Onderdonk*, 59 N. Y. 134; *Boylston v. Wheeler*, 61 N. Y. 521.

5 *Sale v. McLean*, 29 Ark. 612; and so, to same effect, see *Shipman v. Furniss*, 69 Ala. 555, 44 Am. Rep. 528; *Connecticut etc. Ins. Co. v. Smith*, 117 Mo. 261, 38 Am. St. Rep. 656; *Sheppard v. Nixon*, 43 N. J. Eq. 627; *Savings Co. v. Mackenzie*, 33 Or. 209; *Goodrum v. Ayers*, 56 Ark. 93; *Mott v. Danville Seminary*, 129 Ill. 403; *Johnson v. McChesney*, 33 Ill. App. 526; *Gentile v. Kennedy*, 8 N. Mex. 347; *Grove v. Jennings*, 46 Kan. 366; *La Coss v. Wadsworth*, 56 Mich. 421; *Sneathen v. Sneathen*, 104 Mo. 201, 24 Am. St. Rep. 326.

6 *Sutliff v. Smith*, 58 Kan. 559.

7 *Gore v. Dickinson*, 98 Ala. 363, 39 Am. St. Rep. 67; *Trainor v. Greenough*, 145 Ill. 543; *Iberg v. Webb*, 96 Ill. 415.

8 *Packard v. Mining Co.*, 96 Ky. 249; and so, to same effect, *Hew v. Martin*, 90 Ky. 377; *Jackson v. Tatebo*, 3 Wash. 456.

9 Sloan v. Sloan, 25 Fla. 53; Mathews v. Marks, 44 Ark. 436; Connecticut etc. Ins. Co. v. Smith, 117 Mo. 261, 38 Am. St. Rep. 656; Echols v. Hubbard, 90 Ala. 309; Brown v. Wilson, 21 Colo. 309, 52 Am. St. Rep. 228; Mulock v. Wilson, 19 Colo. 296; Graves v. Ewart, 99 Mo. 13; Green v. Niver, 43 S. C. 359; Mitchell v. Shortt, 113 Ill. 251; King v. Carpenter, 37 Mich. 366. Contra, Herrington v. Williams, 31 Tex. 448.

10 Mathews v. Marks, 44 Ark. 436; Wetherell v. Eberle, 123 Ill. 666, 5 Am. St. Rep. 574; Organ v. Railroad Co., 51 Ark. 235, 259; Richards v. Morris, 39 Fla. 205; Baumgardner v. Fowler, 82 Md. 631; and see Goldberg v. Taylor, 2 Utah, 486; Hoffman v. Woods, 40 Kan. 382; Graham v. Mortgage Co., 33 Fla. 356; Coleman v. San Rafael etc. Road Co., 49 Cal. 517; Glos v. Goodrich, 175 Ill. 20; Walker v. Converse, 148 Ill. 622.

11 See Cal. Code Civ. Proc., sec. 738; Brusie v. Gates, 80 Cal. 463; Casey v. Leggett, 125 Cal. 664; Dranga v. Rowe, 127 Cal. 506; Hyde v. Redding, 74 Cal. 493; Davenport v. Stephens, 95 Wis. 456; Kruczinski v. Neuendorf, 99 Wis. 264; Raymond v. Railway Co., 57 Ohio St. 271; Daniels v. Baxter, 120 N. C. 14.

12 Eayrs v. Nason, 54 Neb. 143; and see Stock-Growers' Bank v. Newton, 13 Colo. 245.

13 McGovern v. Mowry, 91 Cal. 383; Detlor v. Holland, 57 Ohio St. 492; Child v. Morgan, 51 Minn. 116; Giltenan v. Lement, 13 Kan. 476.

14 Jackson v. La Moure County, 1 N. Dak. 238; Walker v. Pogue, 2 Colo. App. 149; Frost v. Spitley, 121 U. S. 556.

15 Essex County Nat. Bank v. Harrison, 57 N. J. Eq. 91; Sheppard v. Nixon, 43 N. J. Eq. 627.

16 Taylor v. Clark, 89 Fed. Rep. 7.

17 Reichenbach v. Railway Co., 10 Wash. 357.

18 Rubert v. Brayton, 82 Mich. 632; and see Proprietors etc. v. Central Wharf, 117 Mass. 504; Peacock v. Stott, 104 N. C. 154; Swayze v. Bride, 34 Mo. App. 414.

19 Oberon Land Co. v. Dunn, 56 N. J. Eq. 749; Allaire v. Ketcham, 55 N. J. Eq. 168; Apperson v. Allen, 42 Mo. App. 537.

20 *Phillippi v. Leet*, 19 Colo. 246; *Scorpion etc. Min. Co. v. Marsano*, 10 Nev. 370; *Calderwood v. Brooks*, 45 Cal. 519.

21 *Coleman v. San Rafael etc. Road Co.*, 49 Cal. 517; *Goldberg v. Taylor*, 2 Utah, 486; *Gentile v. Kennedy*, 8 N. Mex. 347; *Diefendorf v. Diefendorf*, 132 N. Y. 100; *Yard v. Ocean Beach Assn.*, 49 N. J. Eq. 309; and see *Park Assn. v. Lloyd*, 55 N. Y. Supp. 108.

22 *Rutherford v. Ullman*, 42 Mo. 216; *Root v. Mead*, 58 Mo. App. 477; *Sloan v. Sloan*, 25 Fla. 53; *King v. Townshend*, 78 Hun, 380, 29 N. Y. Supp. 181; *Amter v. Conlon*, 22 Colo. 150.

§ 518. Parties—Plaintiffs.

In order to maintain a suit to quiet title or remove a cloud therefrom, the plaintiff must have an interest in or title to the property affected.¹ He must show title in himself, and that the defendant has none, or at least not such as he asserts.² If the plaintiff has no title, the defendant's title will not be considered by the court.³ In accordance with the provision in the codes of procedure in the several states, the suit must be prosecuted in the name of the real party in interest.⁴ Under statutory provisions in many of the states, it is immaterial whether the plaintiff's title be a legal or an equitable one.⁵ But it has been held that, if the plaintiff alleges a legal title, he cannot recover by proof of an equitable title.⁶ And that the holder of an equitable title cannot maintain his suit against the holder of the legal title.⁷ In California, the action may be maintained although the legal title is in the United

States.⁸ The owner of a homestead interest may maintain the action.⁹ So it has been held that a mortgagee may maintain the action;¹⁰ so may a trustee;¹¹ purchasers at sales under execution;¹² nonresidents;¹³ attaching creditors;¹⁴ or judgment creditors.¹⁵ In some states the action may be maintained by anyone who claims an estate or interest in remainder or reversion in real property.¹⁶ Under the Nebraska statute, any person claiming title to real property, whether in or out of possession, may maintain the action against any person or persons holding adversely.¹⁷ The action may be brought by an executor or administrator who is entitled to the possession and control of the realty.¹⁸ And cannot be brought by an heir until after the close of the administration upon his ancestor's estate, unless some special circumstance appears which takes the case out of the general rule.¹⁹ But where an administrator takes no estate, right, title, or interest in realty, but only a power, he cannot maintain the action.²⁰ Under the California statute (Code Civ. Proc., sec. 1452), the administrator, a living devisee, and the heirs of a deceased devisee, may properly unite as parties plaintiff.²¹ And a purchaser of land from a devisee, who receives a conveyance of the title before settlement or distribution of the estate, may maintain the action as against anyone except the executor or adminis-

trator.²² By virtue of the Texas statute, an executor or administrator may sue to remove a cloud from title to land owned by the heir without joining the heir as a party, and the judgment rendered will conclude the heir, in the absence of fraud and collusion.²³ Under the Washington statute (Code Proc., sec. 529), the action may be maintained by any or all of the tenants in common of the land.²⁴ But the action cannot be maintained jointly by parties claiming under separate and distinct contracts and deeds, embracing separate and distinct parcels of land purchased at different dates, and in different additions, from the same vendor.²⁵ Owners in severalty under a common source of title, united in interest in the sole question involved may, however, join in the action.²⁶ A purchaser of an interest in land for certain heirs may have a decree quieting title to such interest, where a purchaser from other heirs is in possession claiming title to all the land.²⁷ Pending a controversy between two states as to the location of the boundary line between them, one whose title to tide lands is derived from one of the states, and depends upon the location of such line, cannot maintain a suit to quiet his title against one who claims by grant from the other state.²⁸ A wife is improperly joined with her husband in an action by him to remove a cloud from the title to a homestead of which he

is sole owner, and the misjoinder may be taken advantage of by demurrer.²⁹ A landlord may maintain a bill of peace to restrain the bringing of vexatious suits of trespass quare clausum against his tenant, whom he is bound to secure in the possession of the premises.³⁰

1 Purdy v. Collyer, 49 N. Y. Supp. 665; Chapman v. Jones, 149 Ind. 434, 436; Johnson v. McCheney, 33 Ill. App. 526; Huntington v. Allen, 44 Miss. 654.

2 Ragsdale v. Mitchell, 97 Ind. 458; Johnson v. Murray, 112 Ind. 154, 2 Am. St. Rep. 174; Lawrence v. Zimpleman, 37 Ark. 643; Heney v. Pesoli, 109 Cal. 58; Wolverton v. Nichols, 5 Mont. 91.

3 Ricks v. Baskett, 68 Miss. 250.

4 Chapman v. Jones, 149 Ind. 434; and see Barke v. Early, 72 Iowa, 273.

5 See Eayrs v. Nason, 54 Neb. 143; Tuffree v. Polhemus, 108 Cal. 670; Echols v. Hubbard, 90 Ala. 309; Brown v. Wilson, 21 Colo. 309, 52 Am. St. Rep. 228; also, sec. 517, ante.

6 Johnson v. Pontious, 118 Ind. 270; Stout v. McPheeters, 84 Ind. 585.

7 Glasmann v. O'Donnell, 6 Utah, 446; Castro v. Barry, 79 Cal. 443; Von Drachenfels v. Doolittle, 77 Cal. 295; Brewer v. Houston, 58 Cal. 345; Harrigan v. Mowry, 84 Cal. 456. But compare McKinzie v. Perrill, 15 Ohio St. 162.

8 Orr v. Stewart, 67 Cal. 275; and see Pioneer etc. Co. v. Maddux, 109 Cal. 641, 50 Am. St. Rep. 72.

9 McKinnie v. Shaffer, 74 Cal. 614. And see Sossaman v. Powell, 21 Tex. 664; Smith v. Neufeld, 57 Neb. 660.

10 Wofford v. Board of Police, 44 Miss. 579; Wilson v. Hooser, 72 Wis. 420; Love v. Bryson, 57 Ark. 589.

11 Fatjo v. Swasey, 111 Cal. 628; First Baptist Church v. Branham, 90 Cal. 22.

12 Stock-Growers' Bank v. Newton, 13 Colo. 245; Gould v. Steinburg, 84 Ill. 170. But see Hancock v. Wooten, 107 N. C. 9.

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13 Root v. Mead, 58 Mo. App. 477.

14 Perham v. Fibre Co., 64 N. H. 2.

15 Wellington v. Janvrin, 60 N. H. 174; Wagner v. Law, 3 Wash. 500, 8 Am. St. Rep. 56; and see Baldwin v. Cappel, 50 La. Ann. 315; Stowell v. Haslett, 5 Lans. 380; Stanton v. Catron, 8 N. Mex. 355.

16 Kellar v. Stanley, 86 Ky. 240; Raymond v. Railway Co., 57 Ohio St. 271; Fox v. Coon, 64 Miss. 465; Hall v. Hooper, 47 Neb. 111.

17 Foree v. Stubbs, 41 Neb. 271; Hall v. Hooper, 47 Neb. 111; and see, also, Pennie v. Hildreth, 81 Cal. 127.

18 Laverty v. Sexton, 41 Iowa, 435; Pennie v. Hildreth, 81 Cal. 127.

19 Hazelton v. Bogardus, 8 Wash. 102; and see Harper v. Strutz, 53 Cal. 655; Thorpe v. Sampson, 84 Fed. Rep. 63.

20 Smith v. McConnell, 17 Ill. 135, 63 Am. Dec. 340.

21 Miller v. Luco, 80 Cal. 257; and see Tryon v. Huntoon, 67 Cal. 325.

22 Jordan v. Fay, 98 Cal. 264; and see Thorpe v. Sampson, 84 Fed. Rep. 63.

23 Russell v. Railway Co., 68 Tex. 646.

24 Hannegan v. Roth, 12 Wash. 695; and see, also, O'Donnell v. McIntyre, 37 Hun, 615; Nesbit v. Mining Co., 24 Nev. 273.

25 Utterback v. Meeker, 16 Wash. 185; and see Boot v. Yaw, 46 Iowa, 323; Samuels v. Blanchard, 25 Wis. 329; Hendrickson v. Wallace, 31 N. J. Eq. 605. Compare Ely v. Wilcox, 26 Wis. 91; Chamblin v. Slichter, 12 Minn. 276.

26 Carey v. Brown, 58 Cal. 180; Dart v. Orme, 41 Ga. 376; Prentice v. Forwarding Co., 58 Fed. Rep. 437; and see Osborne v. Railroad Co., 43 Fed. Rep. 824; Bishop v. Rosenbaum, 58 Miss. 84.

27 Rogers v. Turpin, 105 Iowa, 183.

28 Kennedy v. Elliott, 85 Fed. Rep. 832.

29 Grider v. Mortgage Co., 99 Ala. 281, 42 Am. St. Rep. 58.

30 Langdon v. Templeton, 61 Vt. 119.

§ 519. Same—Defendants.

Under statutes extending the right of action to remove a cloud from, or to quiet title to, real estate, the maintenance of such action is authorized against any person who claims an adverse right, title, or estate in, or lien upon, the real estate in question.¹ And whether the hostile claim be apparently valid on its face or the record, so as to constitute a cloud on the title strictly so called, according to adjudications under the old action *quia timet*, is held to be immaterial.² The plaintiff has a right to be quieted in his title when any adverse claim is made, the effect of which might be litigation, or loss or depreciation of the value of his property.³ It is accordingly held that the action lies against the claimant of an invalid mortgage lien.⁴ So the action may be maintained against one who claims title under a lease from the grantor of plaintiff's ancestor.⁵ Under the Oregon statute, the suit lies in favor of one in possession against a purchaser of the land at execution sale, who has served on the plaintiff a notice to quit.⁶ But it is held that a landlord cannot maintain the action against a tenant in possession.⁷ One claiming title as the only heir of an intestate cannot maintain the suit against the "heirs" of such intestate.⁸ And the suit cannot be brought against the "unknown heirs" of a life tenant, if the latter is alive.⁹ If the true

name of the defendant be unknown, he may be sued under a fictitious name.¹⁰ All of the adverse claimants, whether by independent titles or not, may be properly joined as defendants in the action.¹¹ A married woman claiming an inchoate interest in the land, or, on the death of her husband, claiming an absolute interest therein, is a necessary party.¹² In an action to quiet title against an unfounded claim of the defendants, their mortgagee is held not to be a necessary party.¹³ A trustee holding the legal title to the premises in controversy, though having no beneficial interest therein, is a proper party to a final determination of the controversy, and may be brought in as a party defendant by an amendment of the complaint.¹⁴ One who, for the statutory period, has been in the exclusive possession of land claimed by a city to be a public alley, may maintain a suit to quiet title to the land against the city claiming the easement.¹⁵ And the suit to quiet title is held to be a proper proceeding against a municipal corporation to determine its claim that it holds the legal title to land in trust for the people of the state, and that the same has been dedicated to the use of the public.¹⁶ In an action to remove a cloud from title, where the premises have been conveyed by the defendant before commencement of suit, the defendant's grantee is a necessary party.¹⁷ The doctrine that

an action to quiet title is a suit in equity, that equity acts upon the person, and that the person is not brought into court upon service by publication alone, has no application when a state has provided by statute for the adjudication of titles to real estate within its limits as against nonresidents, who are brought into court only by publication.¹⁸ Under such statutes, in an action to quiet title to real estate, brought against one who is a nonresident and out of the state, service of process may be made by publication, and such service will give the court ample jurisdiction to hear and determine the case.¹⁹

1 See *Artell v. Gerlach*, 67 Cal. 483; *Pennie v. Hildreth*, 81 Cal. 127; *Kittle v. Bellegarde*, 86 Cal. 556; *Maxon v. Ayers*, 28 Wis. 612; *Broderick v. Cary*, 98 Wis. 419; *Rhea v. Dick*, 34 Ohio St. 420; *Brenner v. Bigelow*, 8 Kan. 496; *Bogert v. Elizabeth*, 27 N. J. Eq. 568; *Clark v. Darlington*, 7 S. Dak. 151, 58 Am. St. Rep. 835; *Hall v. Hooper*, 47 Neb. 111; *Cook v. Friley*, 61 Miss. 1; *Green v. Glynn*, 71 Ind. 339; *Ormsby v. Ottman*, 85 Fed. Rep. 492.

2 *Fox v. Williams*, 92 Wis. 320; *Broderick v. Cary*, 98 Wis. 419; *Kittle v. Bellegarde*, 86 Cal. 565.

3 *Head v. Fordyce*, 17 Cal. 149; *Arrington v. Liscom*, 34 Cal. 389, 94 Am. Dec. 740.

4 *Withers v. Jacks*, 79 Cal. 297, 12 Am. St. Rep. 143.

5 *Island Coal Co. v. Combs*, 152 Ind. 379; and see *Woodward v. Mitchell*, 140 Ind. 406.

6 *Lovelady v. Burgess*, 32 Or. 418.

7 *Van Winkle v. Hinckle*, 21 Cal. 342.

8 *Cashman v. Cashman*, 123 Mo. 647. See *Hall v. Melvin*, 62 Ark. 439, 54 Am. St. Rep. 301.

9 *Archer v. Brockschmidt*, 5 Ohio N. P. 349.

- 10 Irving v. Carpentier, 70 Cal. 23.
- 11 Kincaid v. McGowan, 88 Ky. 91; Ellis v. Railway Co., 77 Wis. 114; Leinenkugel v. Kehl, 73 Wis. 238; Snow v. Counselman, 136 Ill. 191.
- 12 Thompson v. McCorkle, 136 Ind. 484, 43 Am. St. Rep. 334.
- 13 Snodgrass v. Parks, 79 Cal. 55.
- 14 Reynolds v. Lincoln, 71 Cal. 183.
- 15 Vier v. Detroit, 111 Mich. 646; and see Vincent v. Kalamazoo, 111 Mich. 230.
- 16 People v. Holladay, 93 Cal. 241, 27 Am. St. Rep. 186. See, also, San Francisco v. Holladay, 76 Cal. 18; San Francisco v. Itsell, 80 Cal. 57.
- 17 Johnson v. Robinson, 20 Minn. 170.
- 18 Arndt v. Griggs, 134 U. S. 316.
- 19 Dillon v. Heller, 39 Kan. 599; Cloyd v. Trotter, 118 Ill. 391; Bancroft v. Conant, 64 N. H. 151; Adams v. Cowles, 95 Mo. 501, 6 Am. St. Rep. 74; Mitchner v. Holmes, 117 Mo. 185; Essig v. Lower, 120 Ind. 239; Scarborough v. Myrick, 47 Neb. 794; Knudson v. Litchfield, 87 Iowa, 111; Perkins v. Wakeham, 86 Cal. 580, 21 Am. St. Rep. 67.

§ 520. Pleading—Complaint or Petition.

In the statutory action to quiet title to real property, it is in general sufficient simply to allege that the plaintiff is the owner and in possession of the property, describing it, and that the defendant is unlawfully asserting a claim thereto adverse to him.¹ It is not necessary for the plaintiff to set out specifically the character of his own title, nor is it necessary to allege or define the nature and character of the adverse claim.² An allegation of ownership is a sufficient statement of the plaintiff's right.³ And where the facts stated show that the plaintiff has a valid

interest in the land, it is sufficient.⁴ On the other hand, if the facts stated fail to show title or interest in the plaintiff, the complaint is bad on demurrer, notwithstanding a general allegation of ownership therein.⁵ If plaintiff and defendant both claim under a common grantor, it is not necessary to allege in the complaint that such common grantor had title.⁶ But an allegation that the complainant is the true and equitable owner of the land by purchase from one whose title it fails to show, is not sufficient.⁷ So it is necessary to aver title in the plaintiff at the time the suit was commenced.⁸ It is not necessary to aver in terms that the defendant's claim of title is adverse to the title of the plaintiff, if the facts pleaded show that such claim is inconsistent therewith.⁹ Nor need the nature or character of the adverse claim be particularly described.¹⁰ If the complaint or petition shows, by necessary implication, that the defendant's claim is invalid as against the plaintiff, it need not so aver in terms.¹¹ And although the statements of the petition do not amount to an averment that the defendant is claiming adversely, yet if the answer sets forth the nature of the defendant's claim and shows that it is adverse, this cures the defect in the petition.¹² But an allegation that the plaintiff is informed and believes that the defendant claims some interest in the land is not sufficient.¹³

And if the plaintiff undertakes to set forth the claim of the defendant specifically, and thereby shows that the latter has the better title, then the complaint will be bad on demurrer.¹⁴

1 See *Head v. Fordyce*, 17 Cal. 149; *Paton v. Lancaster*, 38 Iowa, 404; *Weaver v. Apple*, 147 Ind. 304; *Johnson v. Taylor*, 106 Ind. 89; *Pittsburg etc. R. R. Co. v. O'Brien*, 142 Ind. 218; *Willis v. Sweet*, 49 Wis. 505; *Mining Co. v. Marsano*, 10 Nev. 370; *Rose v. Mining Co.*, 17 Nev. 25, 52; *Wall v. Magnes*, 17 Colo. 476; *Durell v. Abbott*, 6 Wyo. 265; *Watson v. Glover*, 21 Wash. 677.

2 *Rough v. Simmons*, 65 Cal. 227; *Castro v. Barry*, 79 Cal. 447; *Riverside etc. Co. v. Jensen*, 108 Cal. 147; *Amter v. Conlon*, 22 Colo. 152; *Union etc. Min. Co. v. Warren*, 82 Fed. Rep. 519; *Ely v. Railroad Co.*, 129 U. S. 291.

3 *Thompson v. Spray*, 72 Cal. 534; *Souter v. Maguire*, 78 Cal. 543; *Cook v. Friley*, 61 Miss. 1; *Scarborough v. Myrick*, 47 Neb. 794; *Fudickar v. Irrigation Dist.*, 109 Cal. 29; *Rogers v. Miller*, 13 Wash. 82, 52 Am. St. Rep. 20.

4 *Wagner v. Law*, 3 Wash. 500, 28 Am. St. Rep. 56; *Earle v. Peterson*, 67 Ind. 503.

5 *Chapman v. Jones*, 149 Ind. 434; *Spencer v. McGonagle*, 107 Ind. 410; *Gruwell v. Seybolt*, 82 Cal. 7.

6 *Fudickar v. Irrigation Dist.*, 109 Cal. 29; *Brown v. Taber*, 103 Iowa, 1.

7 *Harrill v. Robinson*, 61 Miss. 153.

8 *Parke v. Brown*, 12 Ill. App. 291; *Spurck v. Forsyth*, 40 Ill. 439; *Reynolds v. Campling*, 23 Colo. 105.

9 *Kitts v. Willson*, 106 Ind. 147; *Campbell v. Disney*, 93 Ky. 41; *Chaplin v. Holmes*, 27 Ark. 414.

10 *Amter v. Conlon*, 22 Colo. 150; *Moore v. Copp*, 119 Cal. 429; *Glasmann v. O'Donnell*, 6 Utah, 451; *Lumber Co. v. Dow*, 68 Minn. 273; *Monighoff v. Sayre*, 41 N. J. Eq. 113. But compare *Fritz v. Grosnicklaus*, 20 Neb. 413; *Jenks v. Hathaway*, 48 Mich. 536. Instances of sufficient averment of adverse claim, see

Tolleston Club v. Clough, 146 Ind. 93; Clark v. Darlington, 7 S. Dak. 148, 58 Am. St. Rep. 835; Hyde v. Redding, 74 Cal. 493; Southmayd v. Elizabeth, 29 N. J. Eq. 203.

11 Heeser v. Miller, 77 Cal. 192.

12 Whipple v. Earick, 93 Ky. 121.

13 Pfister v. Dascey, 65 Cal. 403.

14 McPheeters v. Wright, 110 Ind. 519.

§ 521. Same—Continued.

In cases where possession on the part of the plaintiff is required in order to maintain the action, it must be alleged that the plaintiff was in possession, otherwise the complaint or petition is fatally defective.¹ He must allege possession at the time of commencement of the suit, and, if the fact be put in issue, prove it.² But in cases where the right of action exists without reference to the question of possession,³ the plaintiff's possession need not, of course, be averred.⁴ Where the land is wild, unimproved, and unoccupied, possession is not necessary to the maintenance of the action, but the fact that the land is wild, etc., is material, and must be alleged and proved.⁵ But if the defendant alleges title in himself and prays affirmative relief, he thereby waives any proof under the allegation of the complaint that the land is vacant and unoccupied.⁶ An averment that the complainant is in possession, or that the land is unimproved and unoccupied is unnecessary, when the facts set forth show that there is no adequate remedy at law.⁷ Failure on part of the plain-

tiff to aver possession must be taken advantage of by demurrer, plea, or answer, otherwise the objection will be deemed to have been waived.⁸ Where it is sought to remove a cloud upon title, under a complaint or petition setting out all the facts, similar to a bill in equity, and independent of statutory regulations, it is not necessary to allege that the plaintiff was in possession of the premises.⁹ But such a state of facts should be disclosed as calls for the exercise of equitable jurisdiction. The nature of the defendant's title or claim, and how it operates as a cloud, should be pointed out, or, if it is unknown, this should be alleged, and a discovery prayed.¹⁰ The facts which show the apparent validity of the instrument which is said to constitute the cloud, and also the facts showing its invalidity, ought to be stated.¹¹ It should be shown in some way that the defendant is setting up a cloud, and either describe how, or explain why the method cannot be described.¹² But if all the facts are alleged which constitute a cloud, that will be regarded as sufficient, although the term "cloud" is not used in the complaint.¹³ A complaint clearly framed as one to remove a specified cloud upon title, cannot, if defective as such, be sustained as a complaint under the statute to determine an adverse claim, although it states facts showing that the plaintiff might have brought and maintained such statutory action.¹⁴

1 *Malona v. Schwing*, 101 Ky. 56; *Cornelison v. Foushee*, 101 Ky. 257; *Richards v. Morris*, 39 Fla. 205; *Edgar v. Edgar*, 26 Or. 65; *Monson v. Jacques*, 144 Ill. 651; *Aldrich v. Boice*, 56 Kan. 170; *Allaire v. Ketcham*, 55 N. J. Eq. 168; *Durell v. Abbott*, 6 Wyo. 265.

2 *Reynolds v. Campling*, 23 Colo. 105; and see *Wall v. Magnes*, 17 Colo. 476.

3 See sec. 517, ante.

4 *Brusie v. Gates*, 80 Cal. 462; *Gore v. Dickinson*, 98 Ala. 363, 39 Am. St. Rep. 67; *Grove v. Jennings*, 46 Kan. 366; *Westbrook v. Schmaus*, 51 Kan. 558.

5 *Richards v. Morris*, 39 Fla. 205; *Glos v. Randolph*, 133 Ill. 197; *Douglass v. Nuzum*, 16 Kan. 515; *Johnson v. McChesney*, 33 Ill. App. 526; *Monson v. Jacques*, 44 Ill. App. 306; *Lemon v. Waterman*, 2 Wash. Ter. 485.

6 *Kipp v. Hagman*, 73 Minn. 5; *Mitchell v. McFarland*, 47 Minn. 535.

7 *Johnson v. McChesney*, 33 Ill. App. 527; *Ely v. Railroad Co. (Sup. Ct., Ariz.)*, 19 Pac. Rep. 6; and see *Holden v. Holden*, 24 Ill. App. 106; *Shays v. Norton*, 48 Ill. 100; *Mitchell v. Shortt*, 113 Ill. 252.

8 *Gage v. Schmidt*, 104 Ill. 106; and see *Monson v. Kill*, 144 Ill. 248; *Snowden v. Tyler*, 21 Neb. 199.

9 *Grove v. Jennings*, 46 Kan. 366.

10 *Douglass v. Nuzum*, 16 Kan. 515; *Wals v. Grosvenor*, 31 Wis. 681; *King v. Higgins*, 3 Or. 406; *Welden v. Stikney*, 1 App. Cas. (D. C.) 343.

11 *Hibernia etc. Soc. v. Ordway*, 38 Cal. 681; and see *Castro v. Barry*, 79 Cal. 443; *Day v. Schnider*, 28 Or. 457; *Shapleigh v. Hull*, 21 Colo. 419; *Hyde v. Redding*, 74 Cal. 493; *Gage v. Reid*, 104 Ill. 509; *Welles v. Rhodes*, 59 Conn. 498; *Barker v. Township*, 63 Mich. 516.

12 *Jenks v. Hathaway*, 48 Mich. 536.

13 *Williams v. Ayrault*, 31 Barb. 364.

14 *Walton v. Perkins*, 28 Minn. 413; *Knudson v. Curley*, 30 Minn. 433; and see *Hays v. Carr*, 83 Ind. 275.

§ 522. Same—Continued.

The description of the land in the bill or complaint should be of a character sufficiently certain to identify the property.¹ But a demurrer for insufficiency of the description in a bill to quiet title to three lots was overruled where one only was not well described.² A decree quieting title is void if the description of the land cannot be ascertained from the record.³ The bill or complaint must, in a proper case, contain an offer by the complainant to do equity. Thus, if a mortgage be given for money borrowed, and the mortgagor afterward seeks to cancel it as a cloud on his title, on account of defects in its execution or acknowledgment, he must offer in his bill to do equity by refunding the money, with lawful interest.⁴ In an action to remove a street assessment as a cloud, upon the ground that it is barred by limitation, and also that it was unfounded in the first instance, the complaint is not demurrable because it fails to allege a tender of the amount of the assessment.⁵

1 *Miller v. Luco*, 80 Cal. 257; *Bishop v. Waldron*, 56 N. J. Eq. 484; *Rees v. McDaniel*, 115 Mo. 145; *Bullion etc. Min. Co. v. Mining Co.*, 5 Utah, 3.

2 *Inge v. Demony*, 25 So. Rep. 228.

3 *Ratliff v. Stretch*, 117 Ind. 526.

4 *Grider v. Mortgage Co.*, 99 Ala. 281, 42 Am. St. Rep. 58; and see, also, *New England etc. Security Co. v. Powell*, 97 Ala. 483; *Martin v. Martin*, 164 Ill. 640; 56 Am. St. Rep. 219; *American etc. Mort. Co. v. Sewell*, 92 Ala. 163; *Card v. Bank*, 23 Conn. 353; *Reed v.*

Kalfsbeck, 147 Ind. 148; **Kimberly v. Fox**, 27 Conn. 307; **Clark v. Darlington**, 7 S. Dak. 148, 58 Am. St. Rep. 835; **Bausman v. Kelley**, 38 Minn. 197, 8 Am. St. Rep. 661; **Weston v. Meyers**, 45 Neb. 95; **Hays v. Carr**, 83 Ind. 275; **Gage v. Kaufman**, 133 U. S. 471. Compare **Stratton v. Land Co.**, 86 Cal. 353; **Benson v. Shotwell**, 87 Cal. 49.

5 **Hinsman v. Spokane**, 20 Wash. 118, 72 Am. St. Rep. 24. See, also, **Dranga v. Rowe**, 127 Cal. 506.

§ 523. Joinder of Causes.

Under code procedure a party may unite his equitable remedy to remove cloud from title with any appropriate cause of action through which he may secure the full and adequate relief to which he may be entitled. A cause of action for the cancellation of a deed to realty may be united with an action for the possession of the same property, when both causes of action affect all the parties in the same character and capacity, and are directly connected with the subject matter of litigation.¹ But there is held to be a misjoinder of causes of action in a complaint which attempts to quiet title under several tax deeds upon different tracts of land, formerly owned by different persons. This would be like foreclosing several mortgages, executed by different parties upon different tracts of land, in one suit, which cannot be done.² Nor can a person in the possession of land maintain an action to quiet his title thereto as against another who holds the legal title, and unite therewith a claim for a part of the purchase money for the land.³ Nor can

a plaintiff, in her complaint, unite a cause of action to annul a marriage on the ground of a former marriage to one who is still alive with a cause of action to quiet her title to her separate estate, in which the defendant falsely claims an interest.⁴ But a complaint in an action to remove a cloud on title is not obnoxious to the objection that it improperly unites several causes of action because it sets out several reasons why the outstanding title is invalid.⁵ The rights of the parties in several tracts of land may be properly adjudicated in the same action to quiet title where the adverse claimants are the same to each tract, but they should all be included in one count.⁶

1 *Stock-Growers' Bank v. Newton*, 13 Colo. 245; and so, to same effect, *Kruezenski v. Neuendorf*, 99 Wis. 264; *Keens v. Gaslin*, 24 Neb. 310.

2 *Turner v. Duchman*, 23 Wis. 500.

3 *Northrop v. Andrews*, 39 Kan. 567.

4 *Uhl v. Uhl*, 52 Cal. 250; and see *Peck v. Peck*, 66 Mich. 591; *Letts v. Letts*, 73 Mich. 145.

5 *Day v. Schnider*, 28 Or. 457.

6 *Pennie v. Hildreth*, 81 Cal. 127.

§ 524. Same—Prayer for Relief, etc.

A general prayer for relief in the bill or complaint will entitle the complainant to such relief as the averments and proof will justify.¹ The complaint may pray other equitable relief in addition to asking that the plaintiff's title be quieted.² But a complaint to quiet title to land,

upon a specific claim of absolute ownership, does not entitle the plaintiff to relief of an entirely different character.³ Under the general prayer for relief, the court may decree that a deed be canceled, although there may be no special prayer in the bill for its cancellation.⁴ And a party out of possession, who brings his suit in equity to quiet title, may unite a prayer to recover possession with the prayer that the cloud on his title be removed.⁵ So it is held that a complaint which contains all the allegations necessary to constitute a cause of action for the removal of cloud from title is sufficient to sustain a trial conducted in a form appropriate to such cause of action, although the prayer of the complaint is in ejectment.⁶ It is also held that a complaint which alleges that the plaintiff is the owner of certain land, that the defendant wrongfully asserts title thereto, and that he has no interest in or title to the same, is a good complaint to quiet title, although in addition damages are claimed by reason of certain false and slanderous statements which it is averred the defendant made concerning the plaintiff's title, and which prevented the sale of the property.⁷

1 Paton v. Lancaster, 38 Iowa, 495; Stockton v. Lockwood, 82 Ind. 158; Smith v. Cockrell, 66 Ala. 64.

2 County of Buena Vista v. Railroad Co., 49 Iowa, 657.

3 Johnson v. Murray, 112 Ind. 154, 2 Am. St. Rep. 174; and see Bryan v. Toimey, 84 Cal. 126.

4 Polk v. Rose, 25 Md. 153, 89 Am. Dec. 773.

5 Lees v. Wetmore, 58 Iowa, 170; Wyland v. Mendel, 78 Iowa, 739, 741.

6 Zimmerman v. Schoenfeldt, 3 Hun, 692.

7 Bisel v. Tucker, 121 Ind. 249.

§ 525. Disclaimer of Adverse Interest.

The defendant has the alternative of either asserting an adverse claim and pleading its nature, or of disclaiming and filing no answer.¹ A disclaimer is essentially a confession, and its office is to save costs which accrue after the entry of a proper judgment embodying the relief the law awards the plaintiff.² Its effect is to entitle the plaintiff to judgment quieting his title to the lands, but without costs.³ But in order that the defendant may recover his costs he must file his disclaimer when he first appears, and if he files it afterward the plaintiff will be entitled to a judgment for all costs accrued up to the date of filing.⁴ And when the defendant, in defiance of the judgment and in opposition to his disclaimer, refuses to yield possession and thus compels the plaintiff to take out a writ, he becomes liable for all costs.⁵ Nor will he escape the payment of costs if, at the time of disclaiming, he answers, denying the allegations of possession in the complaint, thereby compelling the plaintiff to prove that issue, and he finally succeeds on it.⁶ If the defendant disclaims as to a part of the land, he should specify the part disclaimed, otherwise he

must be treated as claiming the whole.⁷ It has in most cases been held that if the defendant files a disclaimer of all interest whatever, judgment may, nevertheless, be entered against him as a matter of course.⁸ A disclaimer is not demurrable.⁹

1 Wall v. Magnes, 17 Colo. 476; Scorpion etc. Min. Co. v. Marsano, 10 Nev. 370; Walker v. Steele, 121 Ind. 436; Osburn v. Hinds County, 71 Miss. 19.

2 McAdams v. Lotton, 118 Ind. 1, 4.

3 Bulwer etc. Min. Co. v. Mining Co., 83 Cal. 589; Castro v. Barry, 79 Cal. 443, 447.

4 Kitts v. Willson, 130 Ind. 492.

5 McAdams v. Lotton, 118 Ind. 1.

6 Brooks v. Calderwood, 34 Cal. 563.

7 Friedman v. Shamblin, 117 Ala. 454.

8 Castro v. Barry, 79 Cal. 443; Tate v. Wyatt, 77 Tex. 492; McAdams v. Lotton, 118 Ind. 1; Donohue v. Ladd, 31 Minn. 244; Quint v. McMullen, 103 Cal. 381. But see Howards v. Davis, 6 Tex. 174.

9 McAdams v. Lotton, 118 Ind. 1.

§ 526. Answer and Defenses.

If the defendant does not disclaim, but relies upon an adverse interest, it is for him to plead its nature by answer. When he has shown by his answer that he asserts such an adverse interest, legal or equitable, as, if sustained by proof, might entitle him to relief in connection with the property, then and not till then is he in position to try the issue of the plaintiff's possession and ownership.¹ The object of the suit to quiet the plaintiff's title is to quiet it against all claims of the

defendant, whatever they may be, and it is the duty of the defendant to set up in his answer whatever interest or right of possession he may claim. If he fails to assert any claim which he may have, he is estopped thereafter from asserting it.² It has likewise been held that if the defendant fails in his duty to assert an adverse interest in himself, specifying its nature, he cannot put the plaintiff upon proof of his possession and title.³ But in some jurisdictions a different doctrine is maintained, the courts holding that if the plaintiff's interest in or ownership of the land is denied, a material issue is raised, which casts upon him the burden of proving such interest or ownership, and until he does this, the defendant is not called upon to produce or prove his claim.⁴ It is also held that where the defendant alleges title in himself, and demands in his answer affirmative relief against the plaintiff, it is not necessary for the plaintiff to prove the allegation of his complaint that the land is vacant and unoccupied, or that he is in possession as the case may be.⁵ A general denial in the answer is sufficient to put in issue the plaintiff's title.⁶ In Indiana, the defendant under his general denial may introduce any facts on the trial which according to the principles of equity, as applied by courts of chancery, would defeat the plaintiff in obtaining a decree quieting his title to the land in question.⁷ In other words, all matters of de-

fense may be proved under the general denial.⁸ But matters in confession and avoidance of the complaint should ordinarily be specially pleaded.⁹ If it does not appear upon the face of the complaint that the action is barred by the statute of limitations, the question can only be presented by answer.¹⁰ So the defendant cannot claim any protection as tenant of the plaintiff unless such tenancy is pleaded in the answer, and a finding as to rights of the defendant under a contract of tenancy not pleaded is outside the issues, and is properly disregarded.¹¹ The defendant may specially plead that the plaintiff has only a lien, or any interest less than he claims, and that the defendant has an equitable title or any interest in the land, either paramount or subordinate to that of the plaintiff, and the decree of the court should declare the rights of the parties in the property accordingly.¹² Such facts as are admitted in the answer bind the defendant, and the plaintiff need not prove them.¹³ The right to relief by suit to quiet title may be lost by laches on the part of the plaintiff. As where he has slept on his rights for many years, and the property has passed into the hands of others, who bought it at a large price, while the plaintiff remained silent, and there was no evidence tending to show an unrecorded transfer to defendant, which had been lost.¹⁴ A judgment in ejectment against a

plaintiff suing on a mere equitable estate is no bar to a subsequent action to quiet title brought by his successor in interest on the same equity.¹⁵ Where a bill to set aside a deed as a cloud on title shows that the complainant owns a part only of the premises affected by the deed, the bill will be good as to such part, though bad as to the residue.¹⁶ A claim of equitable title to land by parol gift is repugnant to, and inconsistent with, a claim of equitable title to the same land arising from the payment of purchase money, and a defense setting up both such titles will be rejected.¹⁷

1 Wall v. Magnes, 17 Colo. 476; and see Weston v. Estey, 22 Colo. 334; Whipple v. Earick, 93 Ky. 121; Cook v. Friley, 61 Miss. 1; Stuart v. Lowry, 49 Minn. 91.

2 Landregan v. Peppin, 94 Cal. 465; Webber v. Clarke, 74 Cal. 11; Bulwer etc. Min. Co. v. Mining Co., 83 Cal. 589; Giltenan v. Lemert, 13 Kan. 476; Reed v. Douglas, 74 Iowa, 244, 7 Am. St. Rep. 476; Green v. Glynn, 71 Ind. 339; Farrar v. Clark, 97 Ind. 449; Morarity v. Calloway, 134 Ind. 503; Hawkins v. Taylor, 128 Ind. 431; Burton v. Huma, 37 Fed. Rep. 738.

3 Wall v. Magnes, 17 Colo. 476.

4 Pennie v. Hildreth, 81 Cal. 127; and see, as sustaining this ruling, Sklower v. Abbott, 19 Mont. 228; Beale v. Blake, 45 N. J. Eq. 668; Flint v. Dulany, 37 Kan. 332, 335; Wakefield v. Day, 41 Minn. 344; Pinney v. Russell, 52 Minn. 443.

5 Mitchell v. McFarland, 47 Minn. 535; Wheeler v. Winnebago Paper Mills, 62 Minn. 429; Kipp v. Hagman, 73 Minn. 5; and see Miller v. Neiman, 27 Ark. 233; Goodrum v. Ayers, 56 Ark. 93.

6 Wakefield v. Day, 41 Minn. 344; Pennie v. Hildreth, 81 Cal. 127; and see Adams v. Crawford, 116 Cal. 495; Flint v. Dulany, 37 Kan. 332.

7 *East v. Peden*, 108 Ind. 92; *O'Donahue v. Creager*, 117 Ind. 372; *Reed v. Kalfsbeck*, 147 Ind. 148.

8 *O'Donahue v. Creager*, 117 Ind. 372; *Ratliff v. Stretch*, 117 Ind. 526.

9 *Bunch v. Bunch*, 26 Ind. 400.

10 *Brusie v. Gates*, 80 Cal. 462.

11 *Snodgrass v. Parks*, 79 Cal. 55.

12 *Pennie v. Hildreth*, 81 Cal. 127.

13 *Reed v. Calderwood*, 32 Cal. 109.

14 *Four Mile etc. Coal Co. v. Gibson* (Ky. Ct. App.), 49 S. W. Rep. 954; and so, to same effect, *Woodstock Iron Co. v. Fullenwider*, 87 Ala. 584, 13 Am. St. Rep. 73; *Wright v. Fisher*, 65 Mich. 279, 8 Am. St. Rep. 886. Compare *Hyde v. Redding*, 74 Cal. 493.

15 *Reynolds v. Lincoln*, 71 Cal. 183.

16 *Snow v. Counselman*, 136 Ill. 191; *Quitman County v. Stritze*, 69 Miss. 460.

17 *Cox v. Cox*, 26 Pa. St. 375, 67 Am. Dec. 432.

§ 527. Cross-Complaint.

Where, in an action to quiet title, the defendant relies upon title in himself, a cross-complaint is held to be unnecessary.¹ But a cross-complaint is held proper in such action, when it seeks to enforce an equitable title against the plaintiff as the holder of the legal title.² So it has been held that where the suit involves a determination of the question of title between the parties, the defendant may assert his legal title by a cross-bill or cross-complaint.³ The defendant must, in his cross-bill, set forth the grounds relied upon for affirmative relief with the same strictness as the complainant in the original bill.⁴ Like a complaint, a cross-complaint must be good within and

of itself, without aid from other pleadings in the cause.⁵ And a cross-complaint to quiet title, which does not so describe the real estate that it can be ascertained, except by reference to the other pleadings in the case, and does not aver that the opposite party claims any adverse interest, nor that his claim is unfounded or a cloud upon the cross-complainant's title, is held bad on demurrer.⁶ But a counterclaim was held to state a good cause of action to quiet title under the Wisconsin statute, although it did not state that the plaintiff was making any claim to the land, since that fact was sufficiently shown by the commencement of the plaintiff's action.⁷

1 *Wilson v. Madison*, 55 Cal. 5; *Miller v. Luco*, 80 Cal. 257, 261; *Mills v. Fletcher*, 100 Cal. 142; and see *Sloan v. Rose*, 101 Wis. 523.

2 *Winter v. McMillan*, 87 Cal. 256, 22 Am. St. Rep. 243.

3 *McKenzie v. Cook Co.*, 113 Mich. 452; and see *Watts v. Sweeney*, 127 Ind. 116, 22 Am. St. Rep. 615; *Putt v. Putt*, 149 Ind. 30; *Goodrum v. Ayers*, 56 Ark. 93; *Magowan v. Branham*, 95 Ky. 581; *Betts v. Signor*, 7 N. Dak. 399; *Remer v. McKay*, 38 Fed. Rep. 164.

4 *San Juan etc. Smelting Co. v. Finch*, 6 Colo. 214.

5 *Campbell v. Routt*, 42 Ind. 410; *Masters v. Beckett*, 83 Ind. 595.

6 *Conger v. Miller*, 104 Ind. 592.

7 *Grignon v. Black*, 76 Wis. 674.

§ 528. Trial.

In a suit in equity to quiet title the court may try the case without a jury, or may submit special

issues to the jury, but their findings of fact are not binding upon the court.¹ If the issues involved are purely equitable, neither party has a right to demand a jury, and the court is not bound by the verdict if a jury is called.² But if questions of a purely legal character are involved, it is held that either party is entitled to a jury as a matter of right.³ The right may, however, be waived;⁴ and is waived by a stipulation between the parties expressly dispensing with a jury trial.⁵ In proceeding under the New York statute, if the answer simply denies that the defendant unjustly claims to own the land, but no affirmative relief is asked, the defendant is not entitled to a jury trial.⁶ As regards findings, their purpose is to answer the questions put by the pleadings, and, if facts are stated in the findings in the same way in which they are stated in the pleadings, they are held to be sufficient.⁷ When the plaintiff's allegations as to ownership and right of possession are found against him in an action of this kind, a failure to find upon other issues is immaterial, and is no ground for reversal.⁸

1 *Mantle v. Noyes*, 5 Mont. 274; *Harral v. Gray*, 10 Neb. 186; and see *King v. Ross*, 28 N. Y. App. Div. 371, 373.

2 *Sweetser v. Dobbins*, 65 Cal. 529; *Moore v. Copp*, 119 Cal. 429; *Roussain v. Patten*, 46 Minn. 308.

3 *Donahue v. Meister*, 88 Cal. 121, 22 Am. St. Rep. 283; *Gillespie v. Gouly*, 120 Cal. 515; *Jennings v. Moon*, 135 Ind. 168; *McCoy v. Johnson*, 70 Md. 490; *Miles v. Strong*, 68 Conn. 273.

4 Book v. Mining Co., 58 Fed. Rep. 827; American etc. Imp. Co. v. Trustees etc., 37 N. J. Eq. 266; Perego v. Dodge, 9 Utah, 3.

5 Hyde v. Redding, 74 Cal. 493.

6 King v. Ross, 28 N. Y. App. Div. 371, 373.

7 Dam v. Zink, 112 Cal. 91. And see, generally, as to the sufficiency of the findings, Carey v. Brown, 58 Cal. 184; Frazier v. Crowell, 52 Cal. 401; Snodgrass v. Parks, 79 Cal. 55; Batchelder v. Baker, 79 Cal. 266; Bushnell v. Mining Co., 12 Colo. 247.

8 Daly v. Sorocco, 80 Cal. 367.

§ 529. Judgment or Decree.

The jurisdiction exercised in the class of cases under consideration is founded upon the administration of a protective or preventive justice. And the courts decline to lay down any strict rule which shall limit their power and discretion as to the particular cases in which the jurisdiction shall be exerted. In general terms, the relief granted will be suited to the circumstances of the particular cases, and in many cases parties will be left to their remedies at law.¹ It is held in New Jersey that the decree in the suit must fix and settle the rights of the parties, and, if the defendants' title be found to be superior to that of the complainant, he is entitled to a decree in his favor to that effect.² So, in Nebraska, the question of title between the parties may be fully litigated and determined in the suit, and a decree rendered assigning the title to the land or any part of it to the party entitled thereto.³ Deeds and other legal instruments, which are a cloud upon title,

may be ordered to be delivered up and canceled.⁴ So an injunction may be granted as ancillary to a judgment quieting title, as against any future claims by the defendant.⁵ And a release or conveyance by the defendant may be ordered.⁶ The judgment or decree must conform to the prayer of the bill or complaint.⁷ The complainant must stand or fall by the case he makes in his bill.⁸ If he seeks to have certain tax deeds set aside as clouds on his title, it is error to set aside any deed other than those described in the bill as affecting the title.⁹ So, if the bill alleges that the complainant is in possession of the premises, and the proof shows that they were in fact vacant and unimproved when the bill was filed, the variance is fatal.¹⁰ It is held error to grant a decree quieting the plaintiff's title on proof of facts showing a right to specific performance simply.¹¹ But in an action for specific performance, if the prayer of the petition is also for general relief, a decree may be rendered quieting the title of the plaintiff.¹² A condition precedent to relief is an offer by the complainant to do equity.¹³ And the court in its decree will protect the equitable right of the defendant. Thus, in an action to quiet title brought against one claiming under an invalid tax deed, the plaintiff's title will be quieted only on condition of payment of all taxes, costs, and interest included in the deed.¹⁴ And where the action is:

against one who claims title under a void judicial sale, and who has paid the taxes on the land under such claim, the decree quieting the title in the plaintiff should award the defendant judgment for the money so paid, with interest thereon, and the same should be made a lien on the land.¹⁵ If a tax has been legally assessed, but there are fatal defects in the proceedings for its collection, the levy will be set aside as a cloud upon title only on condition of the payment of the amount of the tax.¹⁶ A mortgagor, in order to remove the cloud cast upon his title by a sheriff's deed executed in pursuance of a void foreclosure, must offer to pay what is equitably due under the mortgage.¹⁷ So, generally, if a party seeks to quiet his title to realty against one holding and asserting a valid lien, he cannot do so unless he pays or tenders the payment of the lien.¹⁸

1 See *Fonda v. Sage*, 48 N. Y. 173; *Munson v. Munson*, 28 Conn. 582, 73 Am. Dec. 693; *Glazier v. Bailey*, 47 Miss. 395; *Tucker v. Kuniston*, 47 N. H. 267, 93 Am. Dec. 425; *Crawford v. Ritchey*, 43 W. Va. 252; *Eckman v. Eckman*, 55 Pa. St. 269; *Sharon v. Tucker*, 144 U. S. 533; also, sec. 517, ante.

2 *Blatchford v. Conover*, 40 N. J. Eq. 205.

3 *Snowden v. Tyler*, 21 Neb. 199; *Dolen v. Black*, 48 Neb. 688. And so, to same effect, in other jurisdictions: See *Mason v. Black*, 87 Mo. 329; *Entreken v. Howard*, 16 Kan. 551; *Friedman v. Shamblin*, 117 Ala. 454; *Farrar v. Clark*, 97 Ind. 447; *Pennie v. Hildreth*, 81 Cal. 127; *Kitts v. Austin*, 83 Cal. 167; *Perego v. Dodge*, 9 Utah, 3.

4 *Kimberly v. Fox*, 27 Conn. 307; *Shattuck v. Carson*, 2 Cal. 588; *Grigsby v. Shwarz*, 82 Cal. 280; *Linnell*

v. Battey, 17 R. I. 243; Wagner v. Law, 3 Wash. 508, 28 Am. St. Rep. 63; Rucker v. Dooley, 49 Ill. 377, 95 Am. Dec. 614; Duval v. Wilmer, 88 Md. 66; Eck v. Hatcher, 58 Mo. 235.

5 Brooks v. Calderwood, 34 Cal. 563; Axtell v. Gerlach, 67 Cal. 484; Kittle v. Bellegarde, 86 Cal. 565; Rogers v. Turpin, 105 Iowa, 183; Pratt v. Kendig, 128 Ill. 293.

6 Russell v. Deshon, 124 Mass. 342; Land Co. v. Cole, 52 Kan. 790; Kay v. Scates, 37 Pa. St. 31, 78 Am. Dec. 399.

7 See Glos v. Bouton, 170 Ill. 249; Hall v. Towne, 45 Ill. 493; Knudson v. Curley, 30 Minn. 433; Magnuson v. Clithero, 101 Wis. 551. Compare sec. 520, ante.

8 Ohling v. Luitjens, 32 Ill. 23; Jenks v. Hathaway, 48 Mich. 536.

9 Gage v. Curtis, 122 Ill. 520.

10 Glos v. Bouton, 170 Ill. 249.

11 Hennefer v. Hays, 14 Utah, 324; Killey v. Wilson, 33 Cal. 690.

12 Bunz v. Cornelius, 19 Neb. 107.

13 See sec. 522, ante.

14 Wilder v. Cockshutt, 25 Kan. 504; Richards v. Cole, 31 Kan. 205; Barnett v. Cline, 60 Ill. 205; Johnson v. Huling, 127 Ill. 14; Simons v. Drake, 179 Ill. 62.

15 Cassidy v. Woodward, 77 Iowa, 354. See, also, Crawford v. Galloway, 29 Neb. 261.

16 Hamilton etc. Co. v. Township, 107 Mich. 419.

17 Hall v. Hooper, 47 Neb. 111; and so, to same effect, Building Assn. v. Cannon, 99 Tenn. 344; Hall v. Arnott, 80 Cal. 348; Boyce v. Fisk, 110 Cal. 107.

18 Reed v. Kalfsbeck, 147 Ind. 148; and see Johnson v. Murray, 112 Ind. 154, 2 Am. St. Rep. 174; Montgomery v. Trumbo, 126 Ind. 331; Jackson v. Smith, 120 Ind. 520; Shannon v. Hay, 106 Ind. 589; sec. 504, ante.

§ 530. Same—Effect of.

A general decree in an action to quiet title settles all questions affecting the right of the owner

to enjoy his land, whatever their form or character.¹ To the extent that the decree fixes and settles the title to the property it is said to partake of the nature of a judgment in rem.² A decree quieting title is conclusive upon all the parties to the suit, and is not subject to collateral attack.³ A general finding of title in the plaintiff is a conclusive and binding decision against the defendant on the question of title, from whatever source it may be derived, and forever estops him from asserting a claim of title which existed at the time of the finding and judgment, and this applies also in case of judgment by default.⁴ A judgment in favor of the plaintiff against one of several defendants, in an action to set aside a deed as a cloud on plaintiff's title, is an adjudication that the title is in the plaintiff.⁵ So a decree pronouncing that a conveyance is fraudulent and void has the effect to remove any cloud resulting from its execution, without an express direction that it be set aside.⁶ And a judgment that the defendants have no right, title, or interest in or lien upon the land in question is equivalent to a judgment canceling all papers and proceedings upon which the adverse claim is founded, and has the same effect.⁷ A decree in an action to quiet title being a bar to further litigation upon the same subject matter,⁸ it is held that in an action of ejectment, a prior judgment quieting the title of the vendor of the defendants as against the plain-

tiff is *res adjudicata*, and estops and debars the plaintiff from prosecuting the action of ejectment against the defendants.⁹

1 *Railway Co. v. Allen*, 100 Ind. 409, 113 Ind. 308, 3 Am. St. Rep. 650; *Tanguay v. O'Connell*, 132 Ind. 62; *Board of Commrs. v. Welch*, 40 Kan. 767.

2 *Perkins v. Wakeham*, 86 Cal. 580, 21 Am. St. Rep. 67; and see *Bancroft v. Conant*, 64 N. H. 151; *Otis v. De Boev*, 116 Ind. 531; *Bennett v. Fenton*, 41 Fed. Rep. 283.

3 *Davis v. Lennen*, 125 Ind. 185; *Tanguay v. O'Connell*, 132 Ind. 62.

4 *Board of Commrs. v. Welch*, 40 Kan. 767; and see, to same effect, *Farrar v. Clark*, 97 Ind. 449; *Starr v. Stork*, 1 Saw. 276; *Burton v. Huma*, 37 Fed. Rep. 738.

5 *Marshall v. Shafter*, 32 Cal. 176.

6 *Gibbons v. Peralta*, 21 Cal. 629.

7 *Kittle v. Bellegarde*, 86 Cal. 556.

8 *Reed v. Calderwood*, 32 Cal. 109.

9 *Hildreth v. James*, 109 Cal. 299.

§ 531. Writ of Possession.

In an action to quiet title a writ of possession may be awarded by the decree, to the end that equity may be done, and other litigation avoided.¹ Nor is it essential that the decree or judgment itself should direct the issuance of the writ; but the law is fully satisfied by a supplemental order to that effect.² And when judgment is for the plaintiff, the fact that the defendant, since the date of the judgment, has purchased an outstanding title, is no defense to an application for a writ of possession, nor can the merits of the claim be considered upon such application.³ When the de-

fendant, out of possession, sets up an adverse claim of title in his answer which is found to be superior to the claim of the plaintiff, the court may in its decree award possession of the premises to the defendant.⁴ If a person in possession brings the action, but, during its pendency, he is turned out of possession, a judgment in his favor may provide for a restitution of the premises, and the action is not thereby changed into one for the recovery of the possession of the land, but remains an equitable one.⁵

1 *Lees v. Wetmore*, 58 Iowa, 170; *Wyland v. Mendel*, 78 Iowa, 739; *Mason v. Black*, 87 Mo. 329; *People v. Center*, 66 Cal. 551.

2 *Landregan v. Peppin*, 94 Cal. 465; and see *Wyland v. Mendel*, 78 Iowa, 739.

3 *Landregan v. Peppin*, 94 Cal. 465.

4 *Kitts v. Austin*, 83 Cal. 167.

5 *Polack v. Gurnee*, 66 Cal. 266.

§ 532. New Trial.

In Indiana, a new trial, as of right, may be demanded by the losing party in an action to quiet title.¹ And where a party to the action is thus entitled to a new trial, his adversary can in no way affect that right by making a sale of the land in controversy.² But the prevailing rule is, that in an action to quiet title or remove a cloud, neither party is entitled as of right to two trials.³

1 *Earle v. Peterson*, 67 Ind. 503.

2 *Brown v. Cody*, 115 Ind. 484.

3 See *Mollie v. Peters*, 28 Neb. 670; and see *Main v. Payne*, 17 Kan. 608, 610; *Russell v. Nelson*, 32 Iowa, 215.

§ 533. Quieting Title to Personalty, etc.

Actions to quiet title and remove clouds are infrequently brought where the subject is personal property, but the jurisdiction of a court of equity in such cases is said to be well defined and is firmly maintained in some jurisdictions.¹ Thus, it is held that a suit may be maintained by an attaching creditor of personal property in possession of the sheriff under the attachment, for the purpose of removing clouds upon it created by mortgage or otherwise, that would affect its sale.² But an action to quiet title to personal property does not lie in California.³ Title to an easement in the lands of another may be quieted.⁴ It is well settled that the title to a water right may be quieted,⁵ and it is held that the assertion of an adverse claim is all that is required in order to maintain the action. It is not necessary that there should be an actual interference with the plaintiff's right.⁶ But a plaintiff in such action, who claims a right to divert a stream as against riparian proprietors below the point of diversion, must base his claim wholly upon prescription, and, if his claim has not merged into a prescriptive right, he has no right which can be quieted, and he is not in a position to question the rights or the extent of the rights of the defendants.⁷

1 See *Magnuson v. Clithero*, 101 Wis. 551, 554; *Hamilton v. Cummings*, 1 Johns. Ch. 517; *Wellsborough v. Railroad Co.*, 76 N. Y. 182; *Rosenbaum v. Foss*, 4 S. Dak. 184, 193.

2 *Voss v. Murray*, 50 Ohio St. 19; and see *Sherman v. Fitch*, 98 Mass. 59.

3 *Fudickar v. Irrigation District*, 109 Cal. 29. Compare *King v. Hall*, 5 Cal. 82; *Whittaker v. Tuolumne County*, 96 Cal. 100.

4 *Davidson v. Nicholson*, 59 Ind. 411; and so, under the Massachusetts statute: *Crocker v. Cotting*, 173 Mass. 68.

5 *Standart v. Water Co.*, 77 Cal. 399; *Harris v. Harrison*, 93 Cal. 676; *Riverside Water Co. v. Gage*, 89 Cal. 410.

6 *Peregoy v. Sellick*, 79 Cal. 568.

7 *Alta Land etc. Co. v. Hancock*, 85 Cal. 219, 20 Am. St. Rep. 217.

§ 534. Review on Appeal.

Error must be affirmatively shown by the record, otherwise the conclusions of the court below will be adopted and the judgment affirmed.¹ Failure to find upon immaterial issues, not affecting substantial rights, is no cause for reversal.² One not a proper party to the cause or to the judgment, and not aggrieved or affected by the judgment, cannot prosecute an appeal.³ The verdict must stand, if there is any evidence to support it, unless the court erred in directing the issues, or in the introduction or rejection of evidence, or in the instructions to the jury.⁴ But a decree quieting title in favor of the plaintiff, where the possession is controverted by the defendant, will be reversed on proceedings in error,

if there be a total failure of proof showing actual possession.⁵ A defendant against whom the plaintiff's title is properly quieted, to an undivided interest in the premises, cannot object on an appeal taken by himself alone, that the decree, as against other defendants not appealing, quieted the plaintiff's title to a greater extent.⁶

1 Kester v. Jewell, 15 Colo. 220; Lambeth v. Watson, 60 Tex. 479.

2 Daly v. Sorocco, 80 Cal. 367; Labish v. Hardy, 77 Cal. 327.

3 Norton v. Walsh, 94 Cal. 564.

4 Jordon v. Duke (Sup. Ct., Ariz.), 53 Pac. Rep. 197.

5 Douglass v. Bishop, 24 Kan. 749.

6 Tripp v. Duane, 74 Cal. 85.

CHAPTER XXXV.

PARTITION.

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§ 535. Nature and Object of, Generally.

The subject of partition has already been considered at some length in an earlier chapter, to which reference is here made.¹ The present chapter will be confined principally to matters of procedure. The object of partition proceedings is to enable those who own property as joint tenants, or coparceners, or tenants in common to so put an end to the tenancy as to vest in each a sole estate in specific property or an allotment of the lands or tenements. It contemplates an absolute severance of the individual interests of each joint owner, and, after partition, each has the right to enjoy his estate without supervision, let or hindrance from the other.² At common law, the remedy by partition was confined to coparceners. The remedy was, however, extended by early English statutes to joint tenants and tenants in common.³ And the early remedy has been so developed in modern times that practically the right of partition exists without regard to its difficulties. The only real limit to the right is said to lie in the inherent qualities of the estate,⁴ or of the subject.⁵ And a cotenant of personal as well as real property has a right to partition, if that is possible, and, if not, to a regulation of its use equivalent to partition and sale.⁶

1 See chapter XXVII, sec. 367 et seq.

2 Deemer, J., in *Brown v. Cooper*, 98 Iowa, 444, 60 Am. St. Rep. 190; and see *Wiseley v. Findlay*, 3 Rand.

361, 15 Am. Dec. 712; *Phillips v. Dorris*, 56 Neb. 293; *Robinson v. Fair*, 128 U. S. 84.

3 See *Adam v. Ames Iron Co.*, 24 Conn. 230; *Wright v. Marsh*, 2 G. Greene, 94, 105; *Stevens v. Enders*, 13 N. J. L. 271; *Coleman v. Coleman*, 19 Pa. St. 100, 57 Am. Dec. 641; sec. 367, ante.

4 See *Hutchison's Appeal*, 82 Pa. St. 509; *Brown v. Church*, 23 Pa. St. 495.

5 *Coleman v. Coleman*, 19 Pa. St. 100, 57 Am. Dec. 641; *Caldwell v. Snyder*, 178 Pa. St. 420.

6 *Pickering v. Moore*, 67 N. H. 533, 68 Am. St. Rep. 695.

§ 536. Voluntary Partition.

Partition may be effected by the agreement of the parties, and without recourse to the law. Nor is it essential that the partition should be evidenced by deed or even by writing. It is held that a partition which merely severs the relation existing between tenants in common in the undivided whole, and vests title to a correspondent part in severalty, is not such a sale or transfer of title as will be affected by the statute of frauds.¹ At common law, coparceners could make partition of their lands by parol, as well as by deed, and such was the law of Virginia, until changed by statute.² But it is held that a voluntary partition, not evidenced by writing, in order to defeat a right to such partition under the law, must be clearly proven, and must be followed by actual possession in severalty of the several parcels, pursuant to such voluntary partition.³ So a voluntary partition which is not binding on all the co-

tenants is not binding on any.⁴ Thus, a deed purporting to be made by several cotenants, contemplating a partition of the common property, does not become operative as a conveyance until executed by all of the grantors, and is void.⁵ So an attempted partition, by deed inter partes, is void where one of the deeds is invalid, and does not bind the owner of the interest it purports to convey.⁶ A voluntary partition made by persons under legal disabilities will be upheld, if it has been fairly and equally made, and is free from all taint of fraud in its inception and consummation;⁷ but it is otherwise if the transaction be characterized by any unfairness.⁸ A parol partition may be made by co-owners or coproprietors, under the Spanish or Mexican law, as well as by tenants in common under the common law, but, as in the latter case, it must satisfactorily appear that there was not only an agreement to make the partition, but that it was fully executed and followed by a several possession by either the parties themselves or their grantees.⁹

1 *Mellon v. Reed*, 114 Pa. St. 647; *Byers v. Byers*, 183 Pa. St. 509, 63 Am. St. Rep. 765; *Aycock v. Kimbrough*, 71 Tex. 330, 10 Am. St. Rep. 745; *McKnight v. Bell*, 135 Pa. St. 358; and see *Gulick v. Huntley*, 144 Mo. 241; secs. 367, 367a, ante.

2 *Bolling v. Teel*, 76 Va. 487; *Brooks v. Hubble* (Va. Sup. Ct. App.), 27 S. E. Rep. 585.

3 *Patterson v. Martin*, 33 W. Va. 494; *Justice v. Lawson*, 46 W. Va. 163; and see *Aycock v. Kimbrough*,

71 Tex. 330, 10 Am. St. Rep. 745; *Bruce v. Osgood*, 113 Ind. 360; *Pipes v. Buckner*, 51 Miss. 848.

4 *Gates v. Salmon*, 46 Cal. 361; *Hill v. Den*, 54 Cal. 7; *Sutter v. San Francisco*, 36 Cal. 112.

5 *Center v. Davis*, 113 Cal. 307, 54 Am. St. Rep. 353.

6 *Pacific Bank v. Hannah*, 90 Fed. Rep. 72. Compare *Kempner v. Lumber Co.*, 20 Tex. Civ. App. 307.

7 *Mickels v. Ellsesser*, 149 Ind. 415; *Williard v. Williard*, 56 Pa. St. 119; *Townsend v. Downer*, 32 Vt. 183; *Wardlaw v. Miller*, 69 Tex. 395.

8 *Camp Mfg. Co. v. Liverman*, 123 N. C. 7; *Hemich v. High*, 2 Watts, 159, 27 Am. Dec. 295.

9 *Long v. Dollarhide*, 24 Cal. 218; *Elias v. Verdugo*, 27 Cal. 425; and see *Tuffree v. Polhemus*, 108 Cal. 677; *Lantermann v. Williams*, 55 Cal. 66. Confirmation of parol partition: See *Gulick v. Huntley*, 144 Mo. 241.

§ 537. By Action—Jurisdiction.

Suits for partition have been placed in that class of cases in which courts of law and courts of equity have concurrent jurisdiction.¹ It is said that partition has been for centuries a well-recognized branch of equity jurisprudence.² And it is held that partition may be decreed by a court of equity whether the title of the parties be legal or equitable, the practice, generally, being to refer the decision of a disputed legal title to a jury, but, when an equitable title is involved, the whole question is for the decision of the court.³ And the court having acquired jurisdiction of the subject matter on a special and original ground of equity, it will employ its powers to adjust the equities between the parties, growing out of their ownership of, and relation to, the prop-

erty, and the connection of their interests with those of their cotenants, and with the general right or equity of the complainant.⁴ Under the Illinois statute, partition is a suit at law, and, as such, the proceedings, except wherein otherwise provided, should conform, as far as practicable, to the procedure which obtains in courts of law, nor is this requirement affected by the fact that the statute authorizes the court to adjust the equities of the parties the same as a court of equity might under a like state of facts.⁵ But a proceeding for the partition of lands under the Florida statute is not at law, but in chancery, and was not intended as a substitute for or equivalent of an action of ejectment, or to be used for the sole purpose of testing a legal title or trying an issue relative thereto. The statute is held to be merely a regulation of the proceeding in chancery, which forum had long possessed concurrent jurisdiction with that of the law courts over the partition of land.⁶ The statutes of Pennsylvania bearing on the subject assume and recognize the existence of the action of partition on the foundation of the common law and the early English statutes, and merely provide for the jurisdiction of courts and the mode of proceeding. The legislative modifications introduced have been in the line of enlarging the scope of and simplifying the action as a remedy, not changing its essential nature and characteristics.⁷ It was held in Arkansas that

the statutory regulations for partition did not take away the original jurisdiction of chancery. The statute merely cumulates the remedy.⁸ It is well settled that equity has exclusive jurisdiction of suits for the partition of personal property.⁹ The federal courts have no power to hear, on their law side, petitions for the partition of land, under a state statute which provides for the determination of questions arising in such proceedings without a jury, since actions for partition are among the suits at common law in which, under the federal constitution, trial by jury is preserved. But in such case jurisdiction may be taken in equity, partition being a recognized head of equity jurisprudence.¹⁰ This is in accordance with the principle that the jurisdiction of federal courts, sitting as courts of equity, cannot be enlarged or diminished by state legislation.¹¹

1 See *Kitts v. Willson*, 106 Ind. 147; *Deery v. McClintock*, 31 Wis. 195; *Wright v. Marsh*, 2 G. Greene, 94, 105; *Savings Inst. v. Collonious*, 63 Mo. 290; *Cochran v. Thomas*, 131 Mo. 258, 272; *Hale v. Jaques*, 69 N. H. 411.

2 *Klever v. Seawall*, 65 Fed. Rep. 393.

3 *Berry v. Webb*, 77 Ala. 507; *Donnor v. Quartermas*, 90 Ala. 164, 24 Am. St. Rep. 778; *Gore v. Dickinson*, 98 Ala. 363, 39 Am. St. Rep. 67.

4 *Marshall v. Marshall*, 86 Ala. 383; and see, also, *Dean v. Cotton Press Co.*, 64 Ga. 670; *Mayer v. Hover*, 81 Ga. 308, 314; *Paddock v. Shields*, 57 Miss. 340.

5 *Hopkins v. Medley*, 97 Ill. 402; *Greenup v. Sewell*, 18 Ill. 54. See *Bissell v. Peirce*, 184 Ill. 60. Partition under the Ohio statute is a civil action: *McRoberts v. Lockwood*, 49 Ohio St. 374.

6 *Rivas v. Summers*, 33 Fla. 539, 564.

7 *Seiders v. Giles*, 141 Pa. St. 93.

8 *Patton v. Wagner*, 19 Ark. 233; and so, to same effect, *Wilkinson v. Stuart*, 74 Ala. 198.

9 *Weeks v. Weeks*, 5 Ired. Eq. 111, 47 Am. Dec. 358; *Godfrey v. White*, 60 Mich. 443, 1 Am. St. Rep. 537, and note; *Robinson v. Dickey*, 143 Ind. 205, 52 Am. St. Rep. 417.

10 *Klever v. Seawall*, 65 Fed. Rep. 393.

11 *Mississippi Mills v. Cohn*, 150 U. S. 202; *McConihay v. Wright*, 121 U. S. 201, 205; *Payne v. Hook*, 7 Wall. 425.

§ 538. Not a Matter of Discretion.

It is said that an application to a court of equity for partition does not seem to be an application to the sound discretion of the court, to be granted or refused according to the circumstances of the case, as in cases of specific performance and other cases, but to be due *ex debito justitiæ*.¹ It is accordingly held that the only indispensable requisite to entitle the co-owner applying for partition to relief is, that he shall show a clear legal title. If the title is admitted, or is clear, it is matter of right in the party invoking the aid of the court.² In other words, when a case is fairly brought within the law authorizing a partition, the right thereto is imperative and absolutely binding upon the courts of equity. To invoke this equitable remedy is a matter of right, and not of mere grace.³ It is therefore asserted as a general rule that an adult tenant in common may demand partition as a matter of right.⁴ But

there are certain well-recognized exceptions to the rule. Thus, if several tenants in common or joint tenants covenant between themselves that the estate shall be held and enjoyed in common only, equity will not, in the absence of special equities, award a partition at the suit of some of the parties, against the objections of the others. Partition will not be awarded at the suit of one in violation of his own agreement.⁵ But the mere fact that inconvenience or difficulty in making distribution, or even probable loss, is involved in making partition, in no way affects the absolute right to have partition.⁶ And it is held that partition may be compelled although the land sought to be partitioned is subject to a right of way which cannot be destroyed by the partition.⁷ But a partition which would defeat the purpose of a valid trust created by will, or cause a breach thereof, will be denied.⁸

1 Green, J., in *Wiselcy v. Findlay*, 3 Rand. 361, 370, 15 Am. Dec. 712.

2 *Ransom v. High*, 37 W. Va. 838, 38 Am. St. Rep. 67; *McMath v. De Bardelaben*, 75 Ala. 68; *Wood v. Little*, 35 Me. 107; *Higginbottom v. Short*, 25 Miss. 160, 57 Am. Dec. 198.

3 *Hill v. Reno*, 112 Ill. 154, 54 Am. Rep. 222; *Oliver v. Lansing*, 50 Neb. 828.

4 *Ames v. Ames*, 148 Ill. 321; *Trainor v. Greenough*, 145 Ill. 543.

5 *Hill v. Reno*, 112 Ill. 154, 54 Am. Rep. 222; *Martin v. Martin*, 170 Ill. 639, 62 Am. St. Rep. 411. See, also, *Avery v. Payne*, 12 Mich. 510; *Eberts v. Fisher*, 54 Mich. 294; *Baldwin v. Humphrey*, 44 N. Y. 609; *Story*

v. *Palmer*, 46 N. J. Eq. 1; *Latshaw's Appeal*, 122 Pa. St. 142, 9 Am. St. Rep. 76.

6 *Oliver v. Lansing*, 50 Neb. 828; and see sec. 535, ante.

7 *Crocker v. Cotting*, 170 Mass. 68, 64 Am. St. Rep. 278.

8 *Sicker v. Sicker*, 53 N. Y. Supp. 106; 23 Misc. Rep. 737; and see *Morse v. Morse*, 85 N. Y. 53; *Baldwin v. Humphrey*, 44 N. Y. 609.

§ 539. Legal Title in Dispute.

Under the old common-law writ of partition and in suits in equity purely for partition, the court would not pass on conflicting titles, and, where the rights of the parties were involved in adversary claims, would grant no partition until this title was settled by the proper action at law.¹ Equity is not the proper forum, nor is a bill for partition the proper action, for trying the legal title to lands.² And it is a well-established rule that upon a bill for the partition of lands, if the legal title of the parties is brought into dispute, a court of equity will not proceed to settle the disputed title, but will either dismiss the bill or retain it to allow the legal title to be settled in an action at law.³ If, however, in a suit for partition, the title of any party is disputed on equitable grounds, the legal title not being contested, a court of equity will pass upon and settle such dispute in that suit.⁴ This general rule applies to a legal and not to an equitable title.⁵ And where the complainant's right to have one-half of

the property set off to him in severalty is unquestioned, he is entitled to a decree, although the legal title to the other half interest is in dispute between the defendants.⁶ So, when the complainant shows himself seised of the requisite title, he is entitled to a decree, whether the land is held or claimed adversely to him or not.⁷ And adverse possession amounting to an actual ouster must be shown to defeat an action for partition.⁸ So, an exception to the rule that partition cannot be had of lands held adversely, or the title to which is in dispute, is made in favor of vacant lands, where there is no actual possession, but only that constructive possession which is connected with the legal title.⁹ It is likewise held that if the issue is tried without objection, and the disputed title conclusively established in favor of one of the parties, the other will not be heard to question the correctness and binding force of the judgment.¹⁰ In many of the states, courts of equity are authorized by statute to determine questions of title arising in partition suits. This is so in Alabama, and it is said to be the evident purpose of the statute to authorize the determination and adjustment of all the rights and interests of the parties, including controverted questions of title, in one suit in the chancery court.¹¹ So, under the California statute (Code Civ. Proc., secs. 752, 759), the proceeding in partition is one in

which the rights of all parties may be fully inquired into and finally determined.¹² So, under the Washington statute, a suit for partition of lands may be maintained by a tenant in common against those in possession under an adverse claim of title, without the institution of a prior action at law for the trial of title.¹³ In suits for partition under the Virginia statute, the court has jurisdiction to settle all questions of title arising in the case.¹⁴ As regards the statutory action for partition, it is said that the powers conferred upon the courts by the statute are substantially those formerly exercised by the chancery courts in pursuit of the same object, and the methods employed under the statute are, in the main, but a reflex of those pursued under the former equity practice. It is equitable practice prescribed by law.¹⁵ The equities of the respective parties growing out of their ownership of the property, as tenants in common or otherwise, are taken into consideration, and disposed of upon the broad principles which govern courts of equity in the administration of justice.¹⁶ But the statute does not authorize the court to pass on the title of a stranger claiming under a different title, adverse to the title under which the partition is to be made, nor can such stranger and his hostile title be brought into such suit, and the conflict between the two hostile rights settled as incident to partition.¹⁷

- 1 See *Cecil v. Clark*, 44 W. Va. 659.
- 2 *Manners v. Manners*, 2 N. J. Eq. 384, 35 Am. Dec. 512; *Horton v. Sledge*, 29 Ala. 478.
- 3 *Havens v. Seashore Land Co.*, 57 N. J. Eq. 142; *Vreeland v. Vreeland*, 49 N. J. Eq. 323; *Pierce v. Rolins*, 83 Me. 172; *Mattair v. Payne*, 15 Fla. 682; *Voltz v. Voltz*, 75 Ala. 555; *Phillips v. Dorris*, 56 Neb. 293; *McGee v. Hall*, 23 S. C. 388; *Frey v. Willoughby*, 63 Fed. Rep. 865, 11 C. C. App. 463; *Fuller v. Montague*, 59 Fed. Rep. 212; *Gay v. Parpart*, 106 U. S. 689.
- 4 *Vreeland v. Vreeland*, 49 N. J. Eq. 322; *Stockbower v. Kanouse*, 50 N. J. Eq. 481; *Read v. Huff*, 40 N. J. Eq. 229; *Gore v. Dickinson*, 98 Ala. 363, 39 Am. St. Rep. 67.
- 5 *Oliver v. Jernigan*, 46 Ala. 41.
- 6 *Egner v. Meis* (N. J. Eq.), 36 Atl. Rep. 943.
- 7 *Bonham v. Weymouth*, 39 Minn. 92.
- 8 *Colvin v. Hauenstein*, 110 Mo. 575.
- 9 *Byers v. Danley*, 27 Ark. 77; *London v. Overby*, 40 Ark. 155.
- 10 *Carson v. Broady*, 56 Neb. 648, 71 Am. St. Rep. 691.
- 11 *McQueen v. Turner*, 91 Ala. 273, 278; and see *McMath v. De Bardelaben*, 75 Ala. 68; *Sellars v. Friedman*, 100 Ala. 499; *Davis v. Bingham*, 111 Ala. 292.
- 12 *Martin v. Walker*, 58 Cal. 590; and see *Jameson v. Hayward*, 106 Cal. 682, 46 Am. St. Rep. 270.
- 13 *Hill v. Young*, 7 Wash. 33. See, also, to same effect, under statutes of other states, *Pillow v. Improvement Co.*, 92 Va. 144, 53 Am. St. Rep. 804; *Cecil v. Clark*, 44 W. Va. 659; *Weston v. Stoddard*, 137 N. Y. 119, 33 Am. St. Rep. 697; *Gage v. Bissell*, 119 Ill. 298; *Brendel v. Klopp*, 69 Md. 1; *Bonham v. Weymouth*, 39 Minn. 92; *Thompson v. Holden*, 117 Mo. 118; *Lindell Real Estate Co. v. Lindell*, 142 Mo. 61; *Johnson v. Murray*, 12 Lea, 109; *Claughton v. Claughton*, 70 Miss. 384; *Griffin v. Griffin*, 33 Ga. 107.
- 14 *Fry v. Payne*, 82 Va. 759; *Bradley v. Zehmer*, 82 Va. 685.
- 15 *Jameson v. Hayward*, 106 Cal. 682, 46 Am. St. Rep. 270.

16 *Dall v. Mining Co.*, 3 Nev. 535, 93 Am. Dec. 419.

17 *Davis v. Settle*, 43 W. Va. 17, 30; *Carberry v. Railroad Co.*, 44 W. Va. 260, 263.

§ 540. Of What Property.

Partition may be had of a mill and mill privilege.¹ If parties own in common a water power and mills, machinery, dam, and other appurtenances, a partition of the whole property may be made, and where either party insists upon such partition it must be made, regardless of the inconvenience or hardship thereby occasioned. But the rules governing the partition of a water power should be certain, definite, and self-adjusting, so that they will readily apply to all future conditions of the power.² And part owners of a water power cannot be compelled to contribute to the building of weirs at great expense, or to making valuable improvements to facilitate the apportionment of the water, and thus enable a partition in kind by allotment of the water.³ If there cannot be a fair division of the property in kind, the only way in which partition can be made is to sell the property and divide the proceeds.⁴ A ferry franchise partakes so far of the nature of real estate that it may be partitioned in the same manner as real estate.⁵ Partition may be compelled though the land sought to be partitioned is subject to an easement of right of way which cannot be destroyed by the partition.⁶ As a general rule, a partition of real

estate among heirs carries with it, by implication, the same right of way from one part to and over the other as had been plainly and obviously enjoyed by the common ancestor, in so far as it is reasonably necessary for the enjoyment of each part.⁷ A cotenant claiming a homestead right, not having an exclusive right as against the other cotenant, can be compelled by the latter to make partition if the property is capable of fair partition.⁸ But if the premises are not capable of partition, a court of equity has the power to order a sale for the purpose of a division of the proceeds of such sale.⁹ A widow entitled to a homestead may have partition, and have her estate assigned to her in severalty, whether she is in possession or not.¹⁰ A fee conditional estate may be partitioned among the tenants in common.¹¹ Real estate devised cannot be partitioned contrary to the intention of a testator, expressed in his will.¹² One owning the timber on an undivided part of a tract of land, the ownership of the land being in others, cannot maintain partition in equity to divide the timber between him and his co-owners thereof.¹³ Under the law of Michigan, one tenant in common of lands cannot convey his interest in the timber on the lands, and thereby make the other tenants in common cotenants with his grantee in such timber. The only interest which such a grantee takes is the interest in the timber upon such of

the land as in partition proceedings shall be set off to his grantor, which partition must be made of the entirety of the estate according to the shares held by such tenant, after which the grantee will be entitled to all of the rights secured by his conveyance.¹⁴ It is held that there can be no partition of a building as between the parties where it is built under an agreement that the first story and the ground should be owned by one of the parties, and the second story by the other, with a right of egress and ingress over such ground for the owner of the upper story.¹⁵ In such case each party owns his part of the property in severalty, and partition cannot be awarded, since there is no community of interest.¹⁶ A church and burial ground held by two distinct religious societies as tenants in common were held not to be the subject of partition under the law of Pennsylvania.¹⁷ So it was held that in the absence of special legislation partition cannot be made between a city and a county of public property, either by the courts or by one of the parties against the protest of the other.¹⁸ A partition of land, valuable chiefly as an ore-bed, was refused, because the court could not ascertain the value of the different parts, and because the parties could obtain a less hazardous and more adequate remedy in equity.¹⁹ So it was held that a partition of lands containing mineral deposits could not be ordered, if the loca-

tion, extent, and value of such deposits could not be ascertained.²⁰ The courts of one state have no jurisdiction to decree the partition of lands in another state, for the reason that the right to transfer, partition, and change real estate belongs exclusively to the state within whose territory it is situated.²¹ And it was held that partition of lands in another state cannot be made by a court of equity by compelling the parties to execute conveyances to one another in pursuance of the partition, although they are cotenants under the same source of title to a whole tract, a part only of which lies in the state wherein the suit is pending.²² In partition all the real estate must be brought into one proceeding if practicable, and the whole be partitioned at one time.²³ It is said that no fixed rule ever has been or ever can be laid down for the division or partition of the territory covered by inland lakes. And that each case must depend upon its own peculiar circumstances and facts, and as reasonable a division arrived at as possible.²⁴

1 Hanson v. Willard, 12 Me. 142, 28 Am. Dec. 162.

2 Cooper v. Water Power Co., 42 Iowa, 398.

3 Brown v. Cooper, 98 Iowa, 444, 60 Am. St. Rep. 190.

4 Brown v. Cooper, 98 Iowa, 444, 60 Am. St. Rep. 190; and see Wilson v. Bogle, 95 Tenn. 290, 49 Am. St. Rep. 929; Corrothers v. Jolliffe, 32 W. Va. 562, 25 Am. St. Rep. 836.

5 Rohn v. Harris, 130 Ill. 525.

6 Crocker v. Cotting, 170 Mass. 68, 64 Am. St. Rep. 278.

7 Goodall v. Godfrey, 53 Vt. 219, 38 Am. Rep. 671; Ellis v. Bassett, 128 Ind. 118, 25 Am. St. Rep. 421.

8 Hertz v. Buchmann, 177 Ill. 553.

9 Brokaw v. Ogle, 170 Ill. 115; McGrath v. Sinclair, 55 Miss. 89; Kaser v. Haas, 27 Minn. 406.

10 Atkinson v. Atkinson, 40 N. H. 249, 77 Am. Dec. 712; and see, further, as to partition of homestead. Ex parte Worley, 54 S. C. 208, 71 Am. St. Rep. 783; Kirkwood v. Domnan, 80 Tex. 645, 26 Am. St. Rep. 770.

11 Barksdale v. Gamage, 3 Rich. Eq. 271; Du Pont v. Du Bos, 52 S. C. 244.

12 Kepley v. Overton, 74 Ind. 448, under the Indiana statute; Hill v. Jones, 65 Ala. 214; Story v. Palmer, 46 N. J. Eq. 1. Compare Wagstaff v. Marcy, 54 N. Y. Supp. 1021; 25 Misc. Rep. 121; Cabbage v. Franklin, 62 Mo. 364; Faloon v. Flannery, 74 Minn. 38.

13 Morris v. Morrison, 20 Pa. Co. Ct. 295.

14 Benedict v. Torrent, 83 Mich. 181, 21 Am. St. Rep. 589, and see note thereto.

15 Anderson School Township v. Milroy Lodge etc., 130 Ind. 108, 30 Am. St. Rep. 206.

16 Anderson School Township v. Milroy Lodge etc., 130 Ind. 108, 30 Am. St. Rep. 206; and see Russell v. Deasley, 72 Ala. 190; Latshaw's Appeal, 122 Pa. St. 142, 9 Am. St. Rep. 76; Baldwin v. Humphrey, 44 N. Y. 609.

17 Brown v. Lutheran Church, 23 Pa. St. 495.

18 Supervisors v. Alexandria, 95 Va. 469.

19 Conant v. Smith, 1 Aiken, 67, 15 Am. Dec. 660.

20 Kemble v. Kemble, 44 N. J. Eq. 454.

21 Wimer v. Wimer, 82 Va. 890, 3 Am. St. Rep. 126; Godfrey v. White, 43 Mich. 171; Johnson v. Kimbro, 3 Head, 557, 75 Am. Dec. 781.

22 Pillow v. Improvement Co., 92 Va. 144, 53 Am. St. Rep. 804.

23 Deshong v. Deshong, 186 Pa. St. 227; Bigelow v. Littlefield, 52 Me. 21, 83 Am. Dec. 484; Holmes v. Fulton, 193 Pa. St. 270; Sutter v. San Francisco, 36 Cal. 112.

24 Grant, C. J., in *Pittsburgh etc. Iron Co. v. Iron Co.*, 118 Mich. 109, 123.

§ 541. Parties—Generally.

A suit for the partition of real estate between the owners thereof is a proceeding in rem.¹ In such suit all persons having an interest in the property, either as owner or lienholder, at the commencement of the suit, are proper parties thereto, and all persons dealing with the property pendente lite are affected with notice of the orders and proceedings had therein, and are bound thereby.² All cotenants not uniting in the bill for partition should be made parties defendant.³

1 *Crans v. Board etc.*, 87 Ind. 162; *Clark v. Stephenson*, 73 Ind. 489; *Applegate v. Edwards*, 45 Ind. 329.

2 *Milligan v. Poole*, 35 Ind. 64; *Edwards v. Dykeman*, 95 Ind. 509; *De Uprey v. De Uprey*, 27 Cal. 329, 87 Am. Dec. 81, and note; *Winfield v. Stacom*, 40 N. Y. App. Div. 95.

3 *Ferris v. Improvement Co.*, 94 Ala. 557, 33 Am. St. Rep. 146; *Sample v. Sample*, 34 Kan. 73. See sec. 369, ante.

§ 542. Who Entitled to.

As already seen,¹ an adult tenant in common may, as a general rule, demand partition as a matter of right.² But unless it is made otherwise by statute, a tenant in common cannot maintain a bill in equity for partition when he is not in possession or his title is not admitted.³ Generally, the right of partition is given only to one

having the actual or constructive possession. Those who have or may have some interest not coupled with present possession may be made defendants, but cannot themselves institute the proceeding.⁴ It is accordingly held that a grantee in a deed intended as a mortgage cannot maintain a suit for partition of the lands pledged to him.⁵ The grantee in such an instrument has neither title nor right to possession, but only a lien.⁶ If the defendants are in exclusive adverse possession at the time suit is commenced, for a time however brief, partition cannot be maintained, although the plaintiffs claim as cotenants of the defendants.⁷ In New York, the adverse possession of a cotenant of the plaintiff is not a bar to the maintenance of the action for partition.⁸ But one out of possession cannot maintain the action as to land in the possession of a third person, not a party, and claiming ownership.⁹ Where the petition in a partition suit shows that the parties are the owners of the land sought to be partitioned, and nothing therein appears to the contrary, it will be presumed that they are in possession, and, if there is an adverse holding, it is a matter of defense.¹⁰ Tenants in common of a life estate in land may maintain a suit for partition, where the rule has not been changed by statute.¹¹ A widow, to whom lands descend from her husband, may have partition thereof at common law.¹² And it was held that

the heir might have partition against the widow, who held one-half for life only.¹³ But a mere dower interest in the whole estate is not sufficient to authorize the person entitled thereto to maintain partition and cause the estate of the heirs to be sold.¹⁴ A tenant by the curtesy of an undivided share of real estate may maintain an action for partition. And the rule that he cannot maintain the action applies to those cases where he is tenant by the curtesy of the whole estate, and as a consequence his possession is exclusive, and he clearly does not come within the definition of being tenant in common with anybody or of anything.¹⁵ A mortgagor in possession, who is not a tenant at will of the mortgagee, may have partition.¹⁶ An heir is a proper party plaintiff in a partition suit.¹⁷ And an alien heir who is entitled by treaty to take the fee in real estate may maintain an action for partition.¹⁸ And the mere fact that a conveyance of land from father to son was intended as an advancement does not prevent the latter from maintaining an action for partition of other land left by the father on his death.¹⁹ But an heir having no interest in the estate cannot maintain the action.²⁰ One having a life estate in two-thirds of a millsite may demand partition between himself and the owner in fee of the other third.²¹ A tenant in common may join his wife as a coplaintiff in an action for partition, she having an inchoate

right of dower in his share.²² A trustee of an express trust holding the legal title to land may maintain an action for partition in his own name, and the fact that he joins minor cestuis que trust as coplaintiffs does not militate against his right to maintain the action.²³ And it has been held that mortgagees holding the legal title may, under some circumstances, have partition.²⁴ Under the Pennsylvania statute, a son who has detained by conveyance from his mother an undivided interest in her life estate in realty, may maintain his bill in equity for partition, and his right is not defeated by the fact that he has other interests in the land which are contingent.²⁵ A bill for partition in the interest of a lunatic must be filed in his name by his guardian, or he must be joined as a complainant with his guardian.²⁶

1 Sec. 535, ante.

2 See, also, *Kitts v. Willson*, 106 Ind. 147; *Willard v. Willard*, 145 U. S. 116; sec. 538, ante.

3 *Criscoe v. Hambrick*, 47 Ark. 235; *Chapman v. Allen*, 11 Wash. 627; sec. 537, ante.

4 *Windsor v. Simpkins*, 19 Or. 117; *Savage v. Savage*, 19 Or. 112, 20 Am. St. Rep. 795, and note.

5 *Marx v. La Rocque*, 27 Or. 45.

6 *Thompson v. Marshall*, 21 Or. 171; *Adair v. Adair*, 22 Or. 115.

7 *Hutson v. Hutson*, 139 Mo. 229; and see *Wommack v. Whitmore*, 58 Mo. 448; sec. 539, ante.

8 *Weston v. Stoddard*, 137 N. Y. 119, 33 Am. St. Rep. 697.

9 *Damron v. Champion*, 53 N. Y. Supp. 543; 24 Misc. Rep. 234; *Haskell v. Queen*, 21 N. Y. Supp. 357; 66 Hun, 634.

10 Hayes v. McReynolds, 144 Mo. 348.

11 Shaw v. Beers, 84 Ind. 528; Hawkins v. McDougal, 125 Ind. 597; Jenkins v. Fahey, 73 N. Y. 355; Carneal v. Lynch, 91 Va. 114, 50 Am. St. Rep. 819.

12 Longley v. Longley, 92 Me. 395; and see Sears v. Sears, 121 Mass. 267.

13 Allen v. Libbey, 140 Mass. 82.

14 Hurste v. Hoteling, 20 Neb. 178.

15 Tilton v. Vail, 53 Hun, 324.

16 Upham v. Bradley, 17 Me. 423; Call v. Barker, 12 Me. 320. See Watson v. Priest, 9 Mo. App. 263; Green v. Arnold, 11 R. I. 364, 23 Am. Rep. 466; Stewart v. Bank, 101 Pa. St. 342; Martin v. Martin, 95 Va. 26.

17 See Chenery v. Dole, 39 Me. 162; Duncan v. Pope, 47 Ga. 445; Smith v. McWhorter, 74 Miss. 400; Austin v. Railroad Co., 17 Fed. Rep. 466.

18 Schultze v. Schultze, 144 Ill. 290, 36 Am. St. Rep. 432; Scharpf v. Schmidt, 172 Ill. 255.

19 Van Ormer v. Harley, 102 Iowa, 150.

20 Putnam v. Young, 57 Tex. 461; Dinwiddie v. Smith, 141 Ind. 318.

21 Jordan v. Neece, 36 S. C. 295, 31 Am. St. Rep. 869; and see Carneal v. Lynch, 91 Va. 114, 50 Am. St. Rep. 819.

22 Foster v. Foster, 38 Hun, 365. Wife of tenant in common should be a party to the suit: Hannaghan v. Hannaghan, 1 N. B. Eq. Cas. 302.

23 Snell v. Harrison, 131 Mo. 495, 52 Am. St. Rep. 642; and see Cheesman v. Thorne, 1 Edw. Ch. 629; Gallic v. Eagle, 65 Barb. 583; Welch v. Agar, 84 Ga. 583, 20 Am. St. Rep. 380.

24 Colton v. Smith, 11 Pick. 311, 22 Am. Dec. 375; Rich v. Lord, 18 Pick. 322. But see Wotten v. Cope-land, 7 Johns. Ch. 140; Martin v. Martin, 95 Va. 26.

25 Holmes v. Fulton, 193 Pa. St. 270.

26 West v. West, 90 Ala. 458, citing Gorham v. Gorham, 3 Barb. Ch. 24.

§ 543. By Whom not Maintainable.

There can be no partition of real estate owned in severalty.¹ And where the plaintiff purchased at execution sale so much of the defendant's cellar as was not used by him for the use of his family, it was held that the interest which he and the defendant had in the cellar were several and not joint, and that an action for partition by metes and bounds could not be maintained.² A conveyance by a trustee to a cestui que trust which does not extinguish the trust gives the latter no status to maintain an action for partition.³ It is held that neither the beneficiary nor the trustee under a deed of trust can maintain a bill for partition of the property covered by the deed of trust, though a purchaser at a sale thereunder may do so.⁴ Executors and administrators have no authority to institute or maintain proceedings for the partition of land in which their intestates were interested unless the power is expressly given by statute.⁵ The object of a partition suit is to assign property, the fee simple title to which is held by two or more persons as joint tenants, or tenants in common, to them in severalty. And an executor or administrator is neither a joint tenant nor a tenant in common with the heir or devisee of his decedent, and cannot maintain an action for the partition of his real estate.⁶ The general rule unchanged by statute is, that a reversioner or remainderman cannot compel partition during the continuance

of the particular estate.⁷ But by statute in a number of the states reversioners and remaindermen owning interests in fee in land subject to an unexpired life estate are entitled to partition.⁸ Thus, under the Missouri statute, where a widow has dower in real estate, the remaindermen can have it partitioned and sold under the partition decree, subject to her life interest.⁹ The Iowa statute authorizes partition only between joint owners or tenants in common, and it is held that partition cannot be decreed in an action by a life tenant against the remaindermen.¹⁰ A tenant in possession of land under a lease, who acquires an outstanding title to an undivided interest therein from a third person cannot maintain partition without having surrendered possession to the lessor.¹¹ One who sells his interest in realty and takes a mortgage to secure unpaid purchase money, having assigned the mortgage, is not entitled to sue for partition.¹² And it is held that a creditor who holds an absolute deed from one of the tenants in common as security for his debt is only entitled to partition with the concurrence of the debtor, or upon showing good cause why partition should be made.¹³ A suit for partition is not maintainable by persons not having the legal title to the lands, against persons in possession claiming adversely, where the bill seeks to establish the title of the complainants and to invalidate that of the defendants, on the ground

of fraud with which the latter are not connected.¹⁴

1 Johnson v. Moser, 72 Iowa, 523; Clark v. Richardson, 32 Iowa, 399; and see sec. 540, ante.

2 Johnson v. Moser, 72 Iowa, 523.

3 Thebaud v. Schemerhorn, 10 Abb. N. C. 72.

4 Sis v. Boarman, 11 App. Cas. (D. C.) 116.

5 Whitlock v. Willard, 18 Fla. 156; Greeley v. Hendricks, 23 Fla. 366; Terrell v. Weymouth, 32 Fla. 255, 37 Am. St. Rep. 94; Ryer v. Fletcher-Ryer Co., 120 Cal. 482; Throckmorton v. Pence, 121 Mo. 50.

6 Phillips v. Dorris, 56 Neb. 293.

7 Savage v. Savage, 19 Or. 112, 20 Am. St. Rep. 795; Cooper v. Fox, 67 Miss. 237; Merritt v. Hughes, 36 W. Va. 356; Sullivan v. Sullivan, 66 N. Y. 37; Salisbury v. Slade, 160 N. Y. 278; and see sec. 542, ante.

8 See Bierce v. James, 87 Tenn. 538; Roarty v. Smith, 53 N. J. Eq. 253; Scoville v. Hilliard, 48 Ill. 453; Drake v. Merkle, 153 Ill. 318.

9 Hayes v. McReynolds, 144 Mo. 348.

10 Smith v. Runnels, 97 Iowa, 55.

11 Barlow v. Dahm, 97 Ala. 414, 38 Am. St. Rep. 192.

12 Bannon v. Comegys, 69 Md. 411.

13 Welch v. Agar, 84 Ga. 583, 20 Am. St. Rep. 380.

14 Fuller v. Montague, 59 Fed. Rep. 212.

§ 544. Defendants.

As a general rule, all parties interested as part owners should be made parties in a suit for partition.¹ If minors are interested, the proceedings are void as to them unless they are made parties and are personally served with process.² If a tenant in common, suing for a partition, has failed to join all the parties in interest, his vendee may file a bill in the nature of a bill of re-

vivor, in which all such parties may be joined as parties defendant.³ If a cotenant defendant die pending a partition suit, it is necessary that the heir, devisee, or other person authorized to represent the title of such cotenant be made a party defendant before proceeding with the partition.⁴ The personal representative of a deceased owner of an undivided share should be made a party to the action.⁵ And it was held that where it appears that one of the persons entitled as a tenant in common died before the commencement of the partition suit, leaving a widow who was entitled to dower in the estate of the deceased cotenant, it is necessary, to render a decree binding upon such estate, that the administrator thereof be made a party defendant.⁶ A mortgagee is generally regarded as a necessary party to a suit for partition of lands embracing those covered by the mortgage, and in some states this is expressly so provided by statute.⁷ And it is held that a mortgagee, whose mortgage is subsequent to the partition suit, has a right to be made a party to the action.⁸ But it is held in some jurisdictions that a mortgagee is not entitled to be made a party to partition proceedings or to be notified thereof.⁹ In an action for the partition of the lands of a married woman the husband need not be made a party, and is not a proper party.¹⁰ If a female heir marries after suit in partition is brought, her husband need not

be made a party, but can become such, if he desires, under the statute. If he fails to do so no other party can complain.¹¹ Under the Missouri statute married women may sue and defend in partition suits by next friend.¹² Action of partition will not lie against one who is only tenant for life of the whole property of which partition is sought, nor can the judgment affect his estate;¹³ but where the life estate extends only to a part of the land, an actual partition or sale thereof may be had, although it affects the life estate.¹⁴ A widow's right to dower is no bar to partition among tenants in common, but she is not a proper party to a suit for partition among them.¹⁵ But under statutes in some jurisdictions a widow is a proper party to a proceeding in partition.¹⁶ So where the proceeding is in equity.¹⁷ Creditors are not necessary parties to a suit for partition,¹⁸ and if made parties the suit will be dismissed as to them.¹⁹ Under Mississippi practice only those having an interest in the partition or the result sought thereby are properly joined as defendants.²⁰ But under the law of Texas all persons having an interest in the subject matter may be made parties defendant to the suit.²¹ One who acquires title to a part of the land sought to be partitioned during the pendency of the suit need not be made a party by the complainant.²²

1 *Parker v. Chancellor*, 73 Tex. 475; *Caudy v. Stradley*, 1 Del. Ch. 113; *Leinen v. Elter*, 43 Hun, 249; *Ware v. Vignes*, 35 La. Ann. 288; and see sec. 541, ante.

2 *Terrell v. Weymouth*, 32 Fla. 255, 37 Am. St. Rep. 94; *Nichols v. Mitchell*, 70 Ill. 258. See *Frank v. Webb*, 67 Miss. 462; *Havens v. Drake*, 43 Kan. 484; *Miller v. Smith*, 98 Ind. 226; *Welch v. Agar*, 84 Ga. 583, 20 Am. St. Rep. 380; *Bogart v. Bogart*, 138 Mo. 419; *Richardson v. Loupe*, 80 Cal. 490; *Sites v. Eldredge*, 45 N. J. Eq. 633; *Simmons v. Baynard*, 30 Fed. Rep. 532.

3 *Holmes v. Fulton*, 193 Pa. St. 270.

4 *Nelson v. Haisley*, 39 Fla. 145; and see *Lyon v. Register*, 36 Fla. 273; *Molineaux v. Reynolds*, 55 N. J. Eq. 187; *Pearson v. Carlton*, 18 S. C. 47; *Rogers v. Paterson*, 4 Paige, 450.

5 See *Ex parte Worley*, 49 S. C. 41; *Underhill v. Underhill*, 6 N. Y. App. Div. 78. Compare *Harms v. Jacobs*, 160 Ill. 589.

6 *Vason v. Clanton*, 102 Ga. 540.

7 See *Cheney v. Ricks*, 168 Ill. 533; *Uhlfelder v. Tamsen*, 15 N. Y. App. Div. 436; *Johnston v. Donvan*, 106 N. Y. 269; *Whitton v. Whitton*, 38 N. H. 127.

8 *Winfield v. Stacom*, 40 N. Y. App. Div. 95.

9 *Stewart v. Allegheny Nat. Bank*, 101 Pa. St. 342; and see *Martin v. Martin*, 95 Va. 26; *Thruston v. Minke*, 32 Md. 571.

10 *Mapss v. Brown*, 14 Abb. N. C. 94; *Barnes v. Blake*, 59 Hun, 371; *Marshall v. Marshall*, 86 Ala. 383; *Koehler v. Bernicker*, 63 Mo. 370. But see sec. 541, ante.

11 *Estes v. Nell*, 140 Mo. 639.

12 *Oochran v. Thomas*, 131 Mo. 258.

13 *Smalley v. Isaacson*, 40 Minn. 450.

14 *Hanson v. Ingwaldson* (Sup. Ct. Minn.), 80 N. W. Rep. 702. See sec. 540, ante.

15 *Leonard v. Motley*, 75 Me. 418; *Ward v. Gardner*, 112 Mass. 42.

16 See *Barclay v. Kerr*, 110 Pa. St. 130; *Woodward v. Elliott*, 27 S. C. 368.

17 *Green v. Putnam*, 1 Barb. 500.

18 *Townshend v. Townshend*, 1 Abb. N. C. 81; *Martin v. Martin*, 95 Va. 26.

19 *Stevens v. McCormick*, 90 Va. 735. But see *Underhill v. Underhill*, 6 N. Y. App. Div. 78, under the New York statute.

20 *Cooper v. Fox*, 67 Miss. 237; *Nugent v. Powell*, 63 Miss. 99. See *Beebe v. Railroad Co.*, 39 Fed. Rep. 481.

21 *Burleson v. Burleson*, 28 Tex. 383.

22 *Harms v. Jacobs*, 160 Ill. 589. See, as to joinder of defendants in action for partition, *Grady v. Maloso*, 92 Wis. 666.

§ 545. Bill or Complaint.

A bill or complaint for partition should be signed by the parties or their attorneys, but it is held that failure to do so cannot be regarded as a matter of substance, and, therefore, does not render the judgment void.¹ Nor is it necessary that the bill or petition be sworn to unless so required by statute.² The bill must state the complainant's own title, and the title of the defendant, whereby it shall appear that they claim to hold the land as cotenants.³ But a bill naming the proper parties need not make any formal deraignment of title, or any deraignment further than is necessary to describe and locate the land, and to show how the parties became co-owners, that they hold it together and undivided in certain proportions, and that they are entitled to partition.⁴ An allegation that the cotenants are seised in common of the lands is a sufficient allegation of the complainant's possession.⁵

Such allegation raises the presumption of possession.⁶ It is enough if the complaint or petition shows the parties to be in actual or constructive possession, either as tenants in common or as joint tenants.⁷ An allegation that the ancestor died seised and possessed of a tract of land, and that the complainant and the defendants are his only heirs, is held a sufficient averment of the title of the parties.⁸ Under the California statute the complaint must aver that the cotenants hold and are in possession of real property as parceners, joint tenants, or as tenants in common, in which property one or more of them have an estate of inheritance, or for life or lives, or for years.⁹ The complaint must allege a present interest in the land, otherwise it is insufficient.¹⁰ But an allegation that the complainants are the owners in fee of the land means that they are the owners in fee simple.¹¹ The New York statute (Code Civ. Proc., sec. 1542) requires the complaint in partition to describe the property and specify the interest of the parties when known, and, where the interest is unknown, to state such fact, and a complaint alleging that the plaintiff believes that the defendant claims a certain interest, and that the claim is invalid, is held to be insufficient.¹² Under the Washington statute (Code Civ. Proc., sec. 578), it is required that the complaint in an action for partition should set forth specifically and particularly the inter-

est of all persons in the property as far as known to the plaintiff. And when the action is brought by an alleged tenant in common, who has been excluded from possession under an adverse claim of title, his complaint is insufficient if it alleges the legal title in defendants and fails to set forth any facts tending to show an equitable title in himself.¹³ A complaint in partition is good though silent upon the subject of the mode of partition, if sufficient in other respects.¹⁴ A bill for the partition of the land, or for its sale and the division of the proceeds, if not susceptible of partition, is not multifarious.¹⁵ Nor is a bill for partition multifarious because a discovery is prayed.¹⁶ But a bill in equity which seeks to bring into question and have adjudicated distinct and discordant interests is demurrable for multifariousness.¹⁷ Hence, a partition cannot be had of two tracts of land by means of one suit, unless the two tracts are each owned by the same persons.¹⁸ A tenant in common of both tracts in different proportions, of one as cotenant with one person and of the other as cotenant with the same person and others, cannot have judgment for partition of both on one petition.¹⁹ In a number of the states the framing of pleadings in suits for partition has been made a matter of statutory regulation. In such case, a bill following the statute and seeking partition in any mode thereby authorized is in proper and sufficient

form. And any allegations of special reasons for partition, or for having it made in one way or in the other, would be unusual and superfluous.²⁰ And the bill will be deemed sufficient if the allegations bring the case within the reason, though they do not pursue the strict letter of the statute.²¹ In addition to the cases already cited in this section, it may be added that under the California statute a complaint in partition which sets forth every particular required by the statute, and sets out not only the interests of the original cotenants, but also the interests of the respective heirs of a deceased cotenant, is sufficient to give the court jurisdiction to make partition.²² Under the Illinois statute the petition for partition must particularly describe the premises and set forth the rights of all parties interested therein, so far as known, including tenants for years, for life, and all persons who, upon any contingency, may be or become entitled to any beneficiary interest in the premises and pray for the partition of the premises. Nothing more is required to be alleged and proved, and, therefore, it is unnecessary to allege and prove the inability of the tenants in common to agree upon a division.²³ In North Carolina, an allegation of possession is not vitally essential to a petition for partition.²⁴ The petition for partition need not necessarily refer to an inventory which has been made.²⁵

- 1 Cochran v. Thomas, 131 Mo. 258; and see Johnson v. Murray, 12 Lea, 109.
- 2 Martin v. Porter, 4 Heisk. 407.
- 3 Ramsay v. Bell, 3 Ired. Eq. 209, 42 Am. Dec. 163.
- 4 Ransom v. High, 37 W. Va. 838, 38 Am. St. Rep. 67; and see Rutherford v. Jones, 14 Ga. 521, 60 Am. Dec. 655; McGill v. Buie, 106 N. C. 242.
- 5 Keil v. West, 21 Fla. 508; Godfrey v. Godfrey, 17 Ind. 6, 79 Am. Dec. 448; Bolen v. Jacquelin, 67 Hun, 311; 22 N. Y. Supp. 193; Kromer v. Friday, 10 Wash. 621; and see McGill v. Buie, 106 N. C. 242.
- 6 Jenkins v. Van Schaak, 3 Paige, 242.
- 7 Doane v. Mercantile Trust Co. 53 N. Y. Supp. 902; 24 Misc. Rep. 502; Savage v. Savage, 19 Or. 112, 20 Am. St. Rep. 795; Windsor v. Simpkins, 19 Or. 117; and see Bender v. Terwilliger, 48 N. Y. App. Div. 371.
- 8 Martin v. Martin, 95 Va. 26.
- 9 Bradley v. Harkness, 26 Cal. 76; De Uprey v. De Uprey, 27 Cal. 329, 87 Am. Dec. 81; and see, also, Richardson v. Loupe, 80 Cal. 490; Farris v. Hayes, 9 Or. 81; School Corp. v. Lodge etc., 140 Ind. 422; Doane v. Trust Co., 160 N. Y. 494.
- 10 Brown v. Brown, 133 Ind. 476; Wintermute v. Reese, 84 Ind. 308.
- 11 McMahan v. Newcomer, 82 Ind. 565.
- 12 Satterlee v. Kobbe, 57 N. Y. Supp. 341; 39 N. Y. App. Div. 420.
- 13 Chapman v. Allen, 11 Wash. 627. See Hill v. Young, 7 Wash. 33; Weston v. Stoddard, 137 N. Y. 119, 33 Am. St. Rep. 697.
- 14 De Uprey v. De Uprey, 27 Cal. 329, 87 Am. Dec. 81.
- 15 Claude v. Handy, 83 Md. 225, distinguishing Belt v. Bowie, 65 Md. 350.
- 16 Page v. Webster, 8 Mich. 263, 77 Am. Dec. 446.
- 17 Taylor v. King, 32 Mich. 42.
- 18 Kitchen v. Sheets, 1 Ind. 138; Simpson v. Wallace, 83 N. C. 477.
- 19 Hunnewell v. Taylor, 3 Gray, 111; and so, to same effect, Brownell v. Bradley, 16 Vt. 105, 42 Am.

Dec. 498; *Alexander v. Warrance*, 17 Mo. 228; *Yellow Pine Lumber Co. v. Carroll*, 76 Tex. 135; *West v. West*, 90 Ala. 458.

20 *Willard v. Willard*, 145 U. S. 116, 122.

21 *Slingluff v. Stanley*, 66 Md. 220; and see *Ballantyne v. Rusk*, 84 Md. 649.

22 *Richardson v. Loupe*, 80 Cal. 490.

23 *Trainor v. Greenough*, 145 Ill. 543. Instance of sufficiency of complaint in partition: See *Garrett v. Weinberg*, 50 S. C. 310; also, *Davis v. Tebbs*, 81 Va. 600.

24 *Alexander v. Gibbon*, 118 N. C. 796, 54 Am. St. Rep. 757, overruling *Alsbrook v. Reid*, 89 N. C. 151. Sufficient description of petitioner's interest: See *Jewett v. Persons Unknown*, 61 Me. 408.

25 *Johnson v. Barkley*, 47 La. Ann. 98.

§ 546. Answer and Defenses.

It is a good defense to the action for partition, provable under the general denial, that the petitioner is the sole owner of the premises.¹ Facts, and not conclusions of law, should be set out in the answer.² Thus, to entitle a defendant in a partition suit to an allowance of homestead in the premises in controversy, the facts relied upon as establishing his homestead right must be averred in his answer.³ In a suit for partition, the defense of limitation is competent to show an adverse claim and holding against right or title in the plaintiff.⁴ Occupancy of the whole estate for twenty years, under color and claim of title, by one tenant in common constitutes an ouster of his cotenant and gives title to the whole.⁵ But when cotenants own land, and

neither holds possession adversely to the others, the fact that they hold the lands as tenants in common for more than fifteen years is held not to bar the right of either to partition, though they may have enforced that right at any time from the date when they so became tenants in common of the land. To make a plea of the statute of fifteen years a good defense to a suit for partition it must show a holding adversely for fifteen years.⁶ It is also held that an adverse possession by a cotenant for a period less than the time prescribed by law to bar a possessory action is not a good defense to a suit for partition, if the statutes of the state in which the suit is pending authorizes the litigation therein of all questions of title which arise upon the pleadings between the tenants in common and their privies who may be parties to the action.⁷ On a bill for partition, an answer alleging that all of the heirs came together, and, by parol, made a partition of the lands which they inherited from their father, and each of the heirs took possession of the share severally allotted to him, presents a defense to the bill filed by the children of one of such heirs.⁸ An answer alleging that the interest asserted by the plaintiff had been sold for taxes, but failing to show that possession had been taken under the tax sale, is bad.⁹ In an action for partition, a defendant is not entitled to plead and prove that an absolute deed, under

which the petitioner claims a part of his title was given as an equitable mortgage, and that the debt secured thereby has been paid.¹⁰ In an action under the Ohio code, seeking equitable partition together with an account of rents and profits, an answer denying that the plaintiffs have any title to or interest in the premises does not oust the court of jurisdiction.¹¹ Partition is not defeated by the fact that dower has not been assigned, as, under the prayer for general relief, the dower interest of the widow may be set off to her assignee, and the remainder of the land be divided according to the rights of the several parties.¹² And under the Mississippi statute (Code 1892, sec. 3097), the right to maintain partition is not affected by the fact that the estate is in the administrator's hands, and there are unpaid debts against it.¹³ In Missouri, a partition proceeding is an ordinary civil action, and the court may lawfully consider any legal or equitable defense which could properly be interposed in a civil action under the code.¹⁴ In an action by a surviving husband, for partition of lands of which the wife died seised, an answer that before and at her death he had abandoned her without cause, making no provision for her support, is good on demurrer under the Indiana statute (Rev. Stats. 1881, sec. 2448).¹⁵ In Iowa, if the defendant claims a lien on the property because of the payment of a mortgage there-

on, the plaintiff can ask to have a claim for rent growing out of the occupancy of the land by such defendant adjusted, although the statute provides that there shall be no joinder or counterclaim of any other kind, in partition.¹⁶ The court, in its discretion, may permit the defendant to amend his answer or correct it by a supplemental answer.¹⁷ But it was held that the court did not commit error in refusing to permit the defendant to withdraw an answer setting up the entire title in himself, and to file in its place an amended answer, setting up a cotenancy with others.¹⁸

1 *La Plante v. Lee*, 83 Ind. 155.

2 *Nolan v. Skelly*, 62 How. Pr. 102; *Nichols v. Padfield*, 77 Ill. 253.

3 *Angelo v. Aldridge*, 164 Ill. 388.

4 *Portis v. Hill*, 14 Tex. 69, 65 Am. Dec. 99, and note.

5 *Nicholson v. Caress*, 76 Ind. 24; *English v. Powell*, 119 Ind. 93; and see *Colvin v. Hauenstein*, 110 Mo. 575; *Gore v. Dickinson*, 98 Ala. 363, 39 Am. St. Rep. 67; *Belt v. Bowie*, 65 Md. 350.

6 *Jenkins v. Dalton*, 27 Ind. 78; *Peden v. Cavins*, 134 Ind. 494, 39 Am. St. Rep. 276; and see *Bowen v. Swander*, 121 Ind. 164.

7 *Weston v. Stoddard*, 137 N. Y. 119, 33 Am. St. Rep. 697; and see *Howey v. Goings*, 13 Ill. 95, 54 Am. Dec. 427 and note; *Pillow v. Improvement Co.*, 92 Va. 144, 53 Am. St. Rep. 804; *Gore v. Dickinson*, 98 Ala. 363, 39 Am. St. Rep. 67.

8 *Nichols v. Padfield*, 77 Ill. 253.

9 *English v. Powell*, 119 Ind. 93.

10 *Bailey v. Knapp*, 79 Me. 205.

11 *Perry v. Richardson*, 27 Ohio St. 110. Compare *Hill v. Young*, 7 Wash. 33.

- 12 Davis v. Patty (Sup. Ct. Miss.), 76 Miss. 753.
- 13 Garrett v. Colvin, 77 Miss. 408.
- 14 Green v. Walker, 99 Mo. 68.
- 15 Hinton v. Whittaker, 101 Ind. 344.
- 16 Wilcke v. Wilcke, 102 Iowa, 173.
- 17 McCrady v. Jones, 36 S. C. 136, 181.
- 18 Leake v. Hayes, 13 Wash. 213, 52 Am. St. Rep. 34.

§ 547. Jury Trial—Findings.

Suits for partition are not the subjects of exclusive equitable jurisdiction, and in an action for partition a trial by jury may be demanded.¹ But it is held that a statute authorizing courts of equity, in suits for partition, to settle all questions of law which may arise in the case, and which is construed as permitting them to proceed though the defendant holds adversely and in severalty, is not unconstitutional, though it may result in denying the defendant the right to try his title before a jury.² In an action for partition, the concurrent finding of the master and chancellor upon the facts is entitled to the same weight as the verdict of a jury.³

1 Kitts v. Willson, 106 Ind. 147.

2 Pillow v. Improvement Co., 92 Va. 144, 53 Am. St. Rep. 804.

3 Wilson v. Bogle, 95 Tenn. 290, 49 Am. St. Rep. 929.

§ 548. Decree or Judgment.

It has generally been held that, in partition, an interlocutory decree must be first entered, definitely ascertaining the rights and interests of

the respective parties.¹ In New York, the practice of entering in the first instance an interlocutory judgment, to be followed by a final judgment upon the termination of the proceedings authorized by the interlocutory judgment, prevailed in chancery, and is expressly authorized and required by the code of that state.² The general rule is, that all the parties to an action for partition are actors, and each party may set up in his pleadings his interest in the premises and have it ascertained and adjudicated, and such adjudication must appear in the interlocutory decree, in order to its validity, whether there is to be a strict partition or the case is one where the premises cannot be divided and must be sold.³ No decree of partition should be made in the action until all the defendants to the bill have answered, or until a decree pro confesso has been regularly entered against all those who fail to answer.⁴ Under the provisions of the Indiana statute an order decreeing partition is not a final decree in the full and true sense of the term, since it remains open for the purpose of controlling the mode and basis of the partition.⁵ The interlocutory judgment or decree is under the control of the court until the final decision of the partition suit, and may be modified or rescinded at any time before final judgment, even after the expiration of the term at which it was rendered.⁶ If the action

is at law, the interlocutory judgment should conform to the verdict of the jury.⁷ The decree in the action should be limited to the issues.⁸ So it is held that the court should, by its decree, set forth the rights, titles, and interests of all the parties, and should so direct partition as to conserve the interests of all the parties in interest.⁹ In California, a decree in partition which does not adjudicate the interests of the respective parties is ordinarily erroneous.¹⁰ If there are infant defendants, and partition would not conserve their best interests, it is within the discretion of the court to refuse a final decree of partition.¹¹ A decree in partition should not charge the widow with rents and profits of land to which she has acquired title, nor is she entitled to credit for taxes paid on property to which she has title, nor can the decree allow her a share of rents and profits on account of her dower interest, where such dower is never claimed or assigned.¹² A partition decree is not void, although the lands are not described by metes and bounds in the bill, if it asks for a partition of all the decedent's land in the county, and the exact boundaries are thereafter ascertained by a commissioner appointed by the court, and set forth accurately in the decree.¹³ Nor is the judgment or decree void because a share in the estate is owned by minors out of the state, who

have not become parties to the record. The interests of absent parties are sufficiently protected by statutory provisions and the care of the court.¹⁴ If the judgment finds that the defendants have no interest in the land sought to be partitioned, they cannot complain because the judgment does not cover all the lands.¹⁵ Equity has jurisdiction, in a proper case, to correct a mistake in a decree in partition, by setting it aside and making a repartition.¹⁶

1 Lorenz v. Jacobs, 53 Cal. 24; Emeric v. Alvarado, 64 Cal. 618; Morris v. Tracy, 58 Kan. 137.

2 Clarke v. Brooks, 2 Abb. Pr., N. S., 385; Mingay v. Laskey, 142 N. Y. 449; Tilton v. Vail, 117 N. Y. 520; and see, also, Brown v. Cooper, 98 Iowa, 444, 60 Am. St. Rep. 190; Wright v. Strother, 76 Va. 857; Palethorp v. Palethorp, 168 Pa. St. 102.

3 Grant v. Murphy, 116 Cal. 427, 58 Am. St. Rep. 191.

4 Benner v. Street, 32 Fla. 274.

5 Roach v. Baker, 130 Ind. 362; and see Brown v. Cooper, 98 Iowa, 444, 60 Am. St. Rep. 190.

6 Anll v. Day, 133 Mo. 337; Bobb v. Graham, 89 Mo. 207; Warren v. Williams, 25 Mo. App. 22. See Windes v. Earp, 150 Mo. 600.

7 Allen v. Hall, 50 Me. 253.

8 Gulick v. Huntley, 144 Mo. 241.

9 Cheney v. Ricks, 168 Ill. 533; Matheny v. Bohn, 74 Ill. App. 377; Prichard v. Littlejohn, 128 Ill. 123.

10 Grant v. Murphy, 116 Cal. 427, 58 Am. St. Rep. 188; and so, to same effect, Stevens v. McCormick, 90 Va. 735.

11 Tomkins v. Miller (N. J. Eq.), 27 Atl. Rep. 464.

12 Kyle v. Wills, 166 Ill. 501; and see Bedford v. Bedford, 136 Ill. 354; Rawson v. Corbett, 150 Ill. 466.

13 Elk Valley etc. Iron Co. v. Douglass (Tenn. Ch.), 48 S. W. Rep. 365. See Turner v. Dixon, 150 Mo. 416.

14 *Coombs v. Persons Unknown*, 82 Me. 326; and see *Austin v. Female Seminary*, 8 Met. 196, 41 Am. Dec. 497.

15 *Estes v. Nell*, 140 Mo. 639.

16 *Sullivan v. Lumsden*, 118 Cal. 664.

§ 549. Same—Effect, Conclusiveness, etc.

The general principle established by the authorities is, that where title is put in issue in a partition suit the judgment upon it is conclusive.¹ If the issue arising upon the conflicting legal titles is tried without objection, and the title is conclusively established in favor of one of the parties, the adversary party cannot be heard to question the correctness and binding effect of such judgment.² The judgment is also conclusive as to the fact that the parties to the suit are tenants in common.³ A partition, whether by act of the parties or by suit, creates no new title to the shares set off to the parties to be held in severalty. The judgment has simply the effect of severing the unity of possession, and does not vest any new or additional title, where only partition is asked by the pleadings.⁴ A decree in partition cannot affect the interest of heirs who were not parties to the suit.⁵ But a decree or sale based on proceedings wherein certain infant plaintiffs appeared by attorney, and the court appointed a guardian ad litem for them prior to the interlocutory judgment in partition, was held not void upon a collateral attack.⁶ An

amendment of a decree in a partition suit may be had during the term by a nunc pro tunc order;⁷ but such amendment cannot be made where it would operate to the prejudice of the rights of third parties acquired in good faith between the time of the rendition of the original judgment and the entry of the judgment nunc pro tunc.⁸ A review of a judgment in partition does not disturb the decree as to the rights of any of the cotenants except those whose rights are brought in issue by the petition for review.⁹

1 *Watson v. Camper*, 119 Ind. 60; *Crescent Brewing Co. v. Cullins*, 125 Ind. 110; *Finley v. Cathcart*, 149 Ind. 470, 63 Am. St. Rep. 292; sec. 539, ante.

2 *Carson v. Broady*, 56 Neb. 648, 71 Am. St. Rep. 691. So, to same effect, *Jordan v. Van Epps*, 85 N. Y. 427; *Kelly v. Werner*, 53 N. Y. Supp. 1067; 34 App. Div. 68.

3 *Morrill v. Morrill*, 20 Or. 96, 23 Am. St. Rep. 95.

4 *Thompson v. Henry*, 153 Ind. 56; *Haskett v. Maxey*, 134 Ind. 182; *Carter v. Day*, 59 Ohio St. 96, 60 Am. St. Rep. 757; *Harrison v. Ray*, 108 N. C. 215, 23 Am. St. Rep. 57; *Richardson v. Loupe*, 80 Cal. 490. See *Lindell Real Estate Co. v. Lindell*, 142 Mo. 61.

5 *Sutton v. Read*, 176 Ill. 69.

6 *Chrisman v. Divinia*, 141 Mo. 122.

7 *Eddie v. Eddie*, 138 Mo. 590.

8 *McClannahan v. Smith*, 76 Mo. 428.

9 *Lindell Real Estate Co. v. Lindell*, 142 Mo. 61.

§ 550. Decree of Sale for Partition.

The common law gave to joint owners of land the right to have a partition in kind, however inconvenient. But it has been maintained that

courts of equity have inherent jurisdiction to order property to be sold for partition when found to be incapable of partition in kind without serious injury to the interests of the parties.¹ In Alabama, a court of equity has jurisdiction to decree a sale of the real estate of infants for partition, but such court is without jurisdiction to decree a sale of the lands of adult tenants for such purpose, without their consent.² But in the several states, as well as in England, a decree for the sale of the land and a division of the proceeds in a proper case is authorized by statute, and, generally speaking, this authority may be exercised when partition cannot conveniently be made, and the interests of those entitled to the land, or its proceeds, will be promoted by a sale.³ It is held that the statute giving this right, being an innovation upon the common law, must be strictly pursued, and that it must appear from the record that an equal division cannot be made, or that a sale of the land will better promote the interest of all parties than a partition in kind.⁴ Partition by sale is held to be a matter of absolute right when the conditions prescribed by the statute to authorize a sale are found to exist.⁵ A sale must be decreed when necessary to enable the court to divide the property, upon the principle that "equality is equity."⁶ And if, by a partition, the value of all the shares would be much less by reason of

the partition than the value of the whole tract, a partition would be manifestly inequitable, and a sale would be decreed.⁷ A mine must necessarily be partitioned through the instrumentality of a sale.⁸ And where the property consists of land principally valuable for its timber and minerals, and they are almost exclusively in one end of the tract and the minerals are undetermined in extent and value, the partition should be by a sale of the property and a division of the proceeds.⁹ If a part of the lands can be divided without injury, or if the shares of one or more of the parties can be set off to them, and the residue cannot be partitioned, the latter portion only should be ordered sold.¹⁰ And where there is an estate for years in realty held in cotenancy by the parties to the action and a reversion held by one of them only, the partition must be limited to the estate for years, and, though partition cannot be made otherwise than by sale, it cannot include the reversionary estate.¹¹ Mortgaged land cannot be sold on partition, free from the mortgage, and the same paid from the proceeds of the sale.¹²

1 Moore v. Blagge, 91 Tex. 165, 166.

2 Johnson v. Kelly, 80 Ala. 135.

3 See Roberts v. Coleman, 37 W. Va. 143; Wren v. Gibson, 90 Ky. 189; Williams v. Coombs, 88 Me. 183; Wilson v. Bogle, 95 Tenn. 290, 49 Am. St. Rep. 929; Richardson v. Feary, 39 Ch. Div. 45.

4 *Roberts v. Coleman*, 37 W. Va. 157; *Zirkle v. McCue*, 26 Gratt. 532; *Cox v. Kyle*, 75 Miss. 945; *Tindall v. Tindall* (Sup. Ct. Miss.), 3 So. Rep. 581.

5 *Wilson v. Bogle*, 95 Tenn. 290, 49 Am. St. Rep. 929; *Dickson v. Dickson*, 33 La. Ann. 1370. But compare *Willard v. Willard*, 145 U. S. 116; *Graham v. Graham*, 8 Bush, 334; *Moore v. Blagge*, 91 Tex. 151.

6 *Higginbottom v. Short*, 25 Miss. 160, 57 Am. Dec. 198.

7 *Branscomb v. Gillian*, 55 Iowa, 235; *Clason v. Clason*, 6 Paige, 545.

8 *Ienfers v. Henke*, 73 Ill. 405, 24 Am. Rep. 263.

9 *Wilson v. Bogle*, 95 Tenn. 290, 49 Am. St. Rep. 929.

10 *Lucas v. Peters*, 45 Ind. 313.

11 *Jameson v. Hayward*, 106 Cal. 682, 46 Am. St. Rep. 268.

12 *Becker v. Carey* (N. J. Eq.), 36 Atl. Rep. 770.

§ 551. Appointment and Duties of Commissioners.

The appointment of commissioners or referees to make partition is usually made by the court, and it is held that the court has power to fill a vacancy, although there is no statute expressly providing for the appointment of a successor in case of a vacancy.¹ If a commissioner appointed by the court declines to serve, the court may substitute another person in his place without giving notice to the parties.² The appointment of commissioners to make partition and their report are held essential to the entry of a decree of sale, whether the proceeding is by petition under the statute or by bill in equity, and a decree of sale without such precedent step would be subject to

reversal.³ In Nevada, when the court decides in favor of a partition being made, it should appoint referees and direct them to divide and mark out the land, including the improvements, into parcels of equal value, instead of making the division into parcels of equal area.⁴ In some jurisdictions the court may, prior to the appointment of commissioners, select the best means of discovering the most efficient mode of effecting the partition, and to this end may appoint experts or referees to examine and report the true condition of the property, and suggest a mode of partition.⁵ In Louisiana the court or judge is not required to consult either party in the selection of such experts, and the experts are not compelled to give notice to the parties.⁶ But under the California statute (Code Civ. Proc., secs. 761, 762), referees appointed in proceedings in partition to take evidence and report facts affecting the title before the interlocutory decree act judicially, and must give notice to the parties and an opportunity for hearing;⁷ though it is otherwise in the case of referees or commissioners appointed to make partition after the interlocutory decree, whose sole duty it is to apportion and allot the land between the cotenants according to their respective interests as determined by the court, and to report their proceedings to the court.⁸ But when notice of the meetings of the commissioners to make partition is required by

statute, such notice is essential to the validity of their action.⁹ The commissioners are usually sworn before entering upon the discharge of their duties.¹⁰ But failure to take the oath before viewing the premises is held not to be reversible error if it be duly taken before the filing of the final report.¹¹ It is the duty of the commissioners to make a fair and impartial division of the lands according to the rights and interests of the parties, as declared by the judgment of the court.¹² They divide according to the decree, subject to the approval of the court.¹³ Once appointed, they are commissioners for all the parties, and owe to them and the court the duty of fairness and impartiality.¹⁴ And if, in the discharge of their duty, they are influenced and governed by one of the parties in interest to assign to him all the valuable and productive lands, and to the other party land of inferior quality and less in quantity than his share, such action will be fraudulent, and will not be binding on the party injured thereby.¹⁵ If they desire information respecting their duties, they should apply to the court for instruction. They may notify all parties to appear before them, at a time and place stated, and afford them an opportunity to produce proof respecting the value of the land to be partitioned, but in their deliberations, and in the preparation of their report all interested parties should be excluded, otherwise the report

will be set aside.¹⁶ In making partition, it is held that the acts of the commissioners are not judicial, but mere computations based on the judgment of partition defining the share of each tenant.¹⁷ In an equitable partition it is the right and duty of the commissioners to allot to one party such part of the property as may be more advantageous to him on account of its proximity to his other property, if it can be done without injury to the other party, and if the properties be in several parcels, the owners are not entitled to a share of each parcel, but only to an equal share in the whole.¹⁸ Under the California statute (Code Civ. Proc., sec. 797), the court may appoint a single referee to make partition by consent of the parties. And a decree in partition reciting such consent is not objectionable because certain of the parties were minors, if the record shows that they appeared by general guardian.¹⁹ Where the commissioners appointed to make partition report that partition cannot be made without manifest injury, and make an appraisal thereof, it is error for the court to direct a sale of the land until the parties interested have been afforded reasonable time and a reasonable opportunity to elect to take the lands at the appraisal.²⁰ So it is held that if the lands are incapable of an exact or fair division, the court may compensate the party receiving the less valuable lands by creating in his favor

a charge upon the more valuable lands by way of rent, servitude, or easement.²¹

- 1 Coggeshall v. State, 112 Ind. 561.
- 2 Jordan v. McNulty, 14 Colo. 280.
- 3 Rohn v. Harris, 130 Ill. 525.
- 4 Dondero v. Vansickle, 11 Nev. 389.
- 5 See Loyd v. Loyd, 23 La. Ann. 231; Waln v. Meirs, 27 N. J. Eq. 351.
- 6 Cameron v. Lane, 36 La. Ann. 716.
- 7 Richardson v. Loupe, 80 Cal. 490.
- 8 Richardson v. Loupe, 80 Cal. 490; McClanahan v. Hockman, 96 Va. 392; and see Scott v. Harris, 127 Ind. 520.
- 9 Simpson v. Simpson, 59 Mich. 71.
- 10 Ransom v. High, 37 W. Va. 845, 38 Am. St. Rep. 67; Claude v. Handy, 83 Md. 225.
- 11 Jordan v. McNulty, 14 Colo. 280.
- 12 Gooch v. Green, 102 Ill. 507.
- 13 Reed v. Howard, 71 Tex. 204.
- 14 Ransom v. High, 37 W. Va. 838, 38 Am. St. Rep. 67.
- 15 Gooch v. Green, 102 Ill. 507.
- 16 McLaughlin v. Chambers, 57 Mich. 35; Marquette etc. Ry. Co. v. Probate Judge, 53 Mich. 218; Peavey v. Wolfborough, 37 N. H. 286.
- 17 Scott v. Harris, 127 Ind. 520.
- 18 Hall v. Piddock, 21 N. J. Eq. 311; Stannard v. Sperry, 56 Conn. 541; Claude v. Handy, 83 Md. 225; Cochran v. Shoenberger, 33 Fed. Rep. 397.
- 19 Richardson v. Loupe, 80 Cal. 490.
- 20 Morris v. Tracy, 58 Kan. 137.
- 21 Martin v. Martin, 95 Va. 26; Smith v. Smith, 10 Paige, 470.

§ 552. Commissioners' Report.

Some of the authorities hold it to be indispensable that all the commissioners be present to

hear and deliberate when final action is taken, and that the report should show that all were present.¹ But it is held in North Carolina that where three commissioners are appointed to partition land, as prescribed by the statute, the action of any two of them is valid.² And if the commissioners were all present and acted, the report is sufficient if signed by a majority of them.³ The report is in the nature of a special verdict, and must state facts, not mere conclusions of the commissioners, so that the court may judge of the sufficiency of the reasons assigned for their action.⁴ In construing the report, the language cannot receive a construction more favorable to the party to whom land is assigned than if it were the language of the grantor in a deed.⁵ In the absence of evidence to the contrary, the court will presume that the report is true and correct.⁶ And it should not be set aside on the ground that it is false without legitimate proof of its falsehood.⁷ Where the commissioners are disinterested, a report of division will not be set aside as unequal if the testimony, though conflicting, is sufficient to support it.⁸ So it is stated, as a general rule, that a report of commissioners in partition will not be disturbed by the court save for causes which, at law, would entitle a party to a new trial.⁹ An exception to the report on the ground of unfairness will not be sustained, unless it be shown by a clear and decided prepon-

derance of evidence.¹⁰ Subsequent appreciation of the land is not ground for assailing the report, but, upon the discovery of previously unknown elements of value, the court may direct a revaluation, in order to do justice as between tenants in fee and life tenants, at any time before a decree transferring the title.¹¹ If it can be shown that the division proposed by the commissioners is grossly erroneous and unequal, the report may be rejected by the court.¹² Inequality of value, as well as inequality in quantity, is good cause for setting aside the report, and such inequality may be shown by affidavit.¹³ An objection that the report failed to state that the land was not susceptible of division cannot be raised for the first time on appeal.¹⁴ By failing to except, all objections to the report are waived, and the parties are concluded by the decree of the court confirming it.¹⁵ An exception to the report on the ground that the division is unequal as to quality and quantity, but which fails to point out the inequality, and which is not supported by proof, should be overruled.¹⁶

1 Townsend v. Hazard, 9 R. I. 436; Simpson v. Simpson, 59 Mich. 71.

2 Thompson v. Shemwell, 93 N. C. 222; and so, to same effect, Yates v. Gridley, 16 S. C. 496.

3 Simpson v. Simpson, 59 Mich. 71; Odiorne v. Seavey, 4 N. H. 53; Townsend v. Hazard, 9 R. I. 436.

4 Hardin v. Cogswell, 5 Heisk. 549; Burdett v. Norwood, 15 Lea, 491.

- 5 *Munroe v. Stickney*, 48 Me. 458.
- 6 *McClanahan v. Hockman*, 96 Va. 392.
- 7 *Patterson v. Blake*, 12 Ind. 436.
- 8 *Lang v. Constance* (Ky. Ct. App.), 46 S. W. Rep. 693.
- 9 *Matter of Pearl Street*, 19 Wend. 651; *Livingston v. Clarkson*, 4 Edw. Ch. 596.
- 10 *Ransom v. High*, 37 W. Va. 838, 38 Am. St. Rep. 67.
- 11 *Klingensmith's Estate*, 130 Pa. St. 516.
- 12 *Peck v. Metcalf*, 8 R. I. 386; *Curtis v. Snead*, 12 Gratt. 260; *Jewett v. Scott*, 19 Tex. 567; *Hay v. Estell*, 19 N. J. Eq. 133.
- 13 *Riggs v. Dickinson*, 2 Scam. 437, 35 Am. Dec. 113.
- 14 *McCracken v. Droit*, 108 Ill. 428; *Ward v. Ward*, 174 Ill. 432.
- 15 See *Ogle v. Adams*, 12 W. Va. 213; *McCracken v. Droit*, 108 Ill. 428; *Kane v. Parker*, 4 Wis. 123.
- 16 *Martin v. Martin*, 95 Va. 26.

§ 553. Perfecting Title.

At common law, partition can be effected even by parol, and no conveyance is essential.¹ But it is a well-settled doctrine of courts of equity that a decree of partition does not of itself transfer or convey title even after the allotment of the respective shares of each of the parties to the proceeding, but that the legal title remains as it was before. This difficulty is, however, remedied by a decree that the parties make the necessary conveyances to each other, and they may be compelled to do so by attachment, imprisonment, and other powers of the court over them in person.² In a number of the states, where the equity pow-

ers of the courts have been aided by statutes to get rid of the difficulty of compelling parties in person to execute conveyances, the court is authorized to appoint a commissioner to execute the conveyances in the names of the parties, or, in other cases, the statute declares that such a decree itself shall operate as a conveyance of the title.³ In Virginia the court usually directs the execution of mutual conveyances by the parties if *sui juris*, and by a commissioner for those non *sui juris*.⁴

1 See sec. 518, ante.

2 See *Gay v. Parpart*, 106 U. S. 679; *Chickering v. Failes*, 29 Ill. 294; *Deloney v. Walker*, 9 Port. 497; *Hannaghan v. Hannaghan*, 1 N. B. Eq. Cas. 305; *Adams' Equity*, *231.

3 See *Gay v. Parpart*, 106 U. S. 679.

4 *Bolling v. Teel*, 76 Va. 487.

§ 554. Deeds Made by Supposed Coparceners.

In a suit to vacate an erroneous partition of land of which the complainant is the owner in fee, it is not error to set aside deeds made by the supposed coparceners of the lands received by them in the partition where the alienees are before the court. The alienees acquired no better title than was vested in their vendors.¹

1 *Lockhart v. Vandyke*, 97 Va. 356.

§ 555. Sale for Partition, and How Conducted.

A partition sale is a judicial sale, and it is an indispensable prerequisite to the validity of such

a sale that it should be based upon a valid judgment, decree, or order of sale.¹ Such sale is said to be more strictly judicial than a sale under execution.² The sale is not complete until approved and confirmed by the court, and is subject to be set aside for inadequacy of consideration, fraud, unfairness, accident, or mistake, or any intervening irregularity.³ But, after confirmation, mere irregularities are cured, the sale is complete, and the title of the purchaser cannot be disturbed except for fraud in which he participated.⁴ The decree of confirmation is the final decree in the proceeding for the sale, and cannot be collaterally impeached.⁵ The order of sale expires with the term at which the sale is required to be made, and a sale at a subsequent term without a renewal of the order is void.⁶ Compliance with the statutory requirement as to notice is essential to the validity of the sale.⁷ The sale must be conducted by the officer designated in the order of sale, who may, however, employ an auctioneer.⁸ Should the officer die before passing the act of sale, the court may appoint a new officer to complete the execution of its decree.⁹ It is the duty of the officer appointed to conduct the sale to offer the property in such a manner as to bring its fair market value, and to exercise the same judgment and prudence that a careful owner would exercise in the sale of his own property.¹⁰ As a general rule, any

person having the capacity to enter into a binding contract may become a purchaser at a partition sale. But it is an established principle of universal application, that no one can be permitted to purchase an interest in property and hold it for his own benefit where he has a duty to perform in relation to such property which is inconsistent with the character of a purchaser on his own account, and for his individual use.¹¹ It is accordingly held that a receiver of the property appointed in an action for partition cannot purchase the property for himself from those who do not know that he is a purchaser.¹² And if he purchases the land from the heirs through a third person for much less than its actual value, the vendors are at liberty to avoid the sale on repaying the amounts received.¹³ So a purchase by a guardian ad litem as an individual, and not for the benefit of the infant wards, is prohibited.¹⁴ An attorney for one of the parties may become a purchaser at the sale, but in such case his conduct will be closely scrutinized, and if he has not acted with strict fairness, the purchase will be held to have been made for his client.¹⁵ So administrators may purchase at the sale, provided they seek no advantage by virtue of their official relation to the property.¹⁶ A combination among bidders to stifle competition is ground for avoiding the sale.¹⁷ But where joint owners, too poor to buy at a partition sale, agree to share

in the bid of a person who subsequently buys the land, the agreement is not such misconduct as will prevent confirmation of the sale.¹⁸ The employment of a puffer to bid at a sale in partition, with intent to enhance the price of the property, and not merely as a defensive precaution against an undue sacrifice of the property, is a transaction which cannot be justified in equity, and constitutes ground for setting the sale aside absolutely.¹⁹

1 Burnham v. Hitt, 143 Mo. 414; Stevens v. McCormick, 90 Va. 735.

2 Girard L. Ins. Co. v. Farmers' etc. Bank, 57 Pa. St. 388.

3 Loyd v. Loyd, 61 Iowa, 243; Kellam v. Richards, 56 Ala. 238; Ladd v. Brick Co., 68 N. H. 185.

4 Kellam v. Richards, 56 Ala. 238; Thompson v. Frew, 107 Ill. 478.

5 Hutton v. Williams, 35 Ala. 503, 76 Am. Dec. 297; Worthington v. McRoberts, 9 Ala. 297; Kirk v. Kirk, 137 N. Y. 510; Hatch v. Ferguson, 68 Fed. Rep. 43.

6 Hughes v. Hughes, 72 Mo. 136; Carson v. Hughes, 90 Mo. 173.

7 Gernon v. Bastick, 15 La. Ann. 697; Stoffel v. Reiners, 3 Mo. App. 33.

8 Johnson v. Barkley, 47 La. Ann. 98. See Arble's Estate, 161 Pa. St. 373.

9 Covas v. Bertonlin, 45 La. Ann. 160; and see Coggeshall v. State, 112 Ind. 561.

10 Hopper v. Hopper, 79 Md. 400; and see Ward v. Ward, 174 Ill. 432.

11 Van Epps v. Van Epps, 9 Paige, 237; Taylor v. Klein, 47 N. Y. App. Div. 343.

12 Jahn v. Gleason, 11 Misc. Rep. 483.

13 Jahn v. Gleason, 11 Misc. Rep. 483.

14 O'Donoghue v. Boies, 92 Hun, 3.

15 *Hess v. Voss*, 52 Ill. 472.

16 *Rogers v. Rogers* (Tenn. Ch. App.), 42 S. W. Rep. 70.

17 *Wood v. Wood* (Ky. Ct. App.), 38 S. W. Rep. 709.

18 *Allen v. Martin*, 61 Miss. 78.

19 *Fisher v. Hersey*, 17 Hun, 370. See, also, *Veazie v. Williams*, 8 How. 148; *Peck v. List*, 23 W. Va. 393, 395, 48 Am. Rep. 414, 416; *Hartwell v. Gurney*, 16 R. I. 79.

§ 556. Same—Inadequacy of Price, etc.

It has generally been held by the American courts that mere inadequacy of price, where it is not so gross as to raise per se a presumption of fraud, will not prevent a confirmation of the sale.¹ But where property valued at not less than eight thousand dollars was sold at partition sale for fifteen hundred dollars, it was held that the sale was for such a grossly inadequate price as to raise an inference of unfairness, and that the sale should be set aside.² It is likewise held that when it appears that the land was sold for an inadequate price, it is the duty of the court, when moved by the parties in interest, to set aside the sale and order a resale.³ The English practice of reopening bids on a proposed advance in price, based on the doctrine that the court is vendor, does not prevail in the United States.⁴ But it is the right of the parties in interest to obtain the highest price they can, and they may ask the court to open biddings, and a discretion is reposed in the court to direct a sale upon the offer

of an advanced bid when a valid and sufficient reason may be given for such action.⁵ In a few of the states the English rule that biddings will be reopened, upon the offer of an advance of ten per cent upon the former bid, practically prevails.⁶

1 See *Swofford v. Garmon*, 51 Miss. 348; *Allen v. Martin*, 61 Miss. 78.

2 *Johnson v. Avery*, 60 Minn. 262, 51 Am. St. Rep. 529.

3 *Loyd v. Loyd*, 61 Iowa, 243. Compare *Kemp v. Hein*, 48 Wis. 32; *Kirkland v. Express Co.*, 57 Miss. 316.

4 See *Allen v. Martin*, 61 Miss. 78, 86; *Lefevre v. Laraway*, 22 Barb. 167.

5 *Loyd v. Loyd*, 61 Iowa, 243; *Hamilton's Estate*, 51 Pa. St. 58.

6 See *Blue v. Blue*, 79 N. C. 69; *Collins v. Wood*, 88 Tenn. 779.

§ 557. Completion of Bid, Confirmation of Sale, etc.

A bidder at a sale for partition may be compelled to stand by the offer he has made and complete his bid by paying the purchase money.¹ On failure by the purchaser to comply with the terms of the sale, and the land is resold under an order of the court, the commissioners may, for the use of the beneficiaries under the sale, sue such purchaser for the damages resulting from his default.² Or, upon failure of the purchaser to complete the sale, the court may order the property resold at the purchaser's risk, and he is

bound by such order if he has notice of it, and, if not, he should move to vacate or modify the order, and should take an appeal upon the denial of his motion.³ Until confirmation of the commissioner's report, the purchaser is not compellable to complete his purchase, nor is he entitled to a conveyance.⁴ No deed can be executed to confer title until there is an approval or confirmation of the sale by the court.⁵ Nor is a purchaser entitled to a conveyance until the purchase money is paid,⁶ although there be a confirmation of the sale.⁷ It is held that there is no warranty of title in partition sales, and that the maxim *caveat emptor* applies.⁸ But the weight of authority is to the effect that a purchaser at a sale for partition is entitled to a clear and marketable title.⁹ He has a right to expect and demand a marketable title and one free from a reasonable doubt as to its validity.¹⁰ If an investigation by the master shows a reasonably clear and marketable title, specific performance will be directed, but if there is a rational doubt of the validity of the title, the court will not compel compliance.¹¹

1 *Cowell v. Lippitt*, 3 R. I. 92; and see *Blanz v. Bain*, 95 Tenn. 87.

2 *Hutton v. Williams*, 35 Ala. 503; *Griel v. Randolph*, 108 Ala. 601.

3 *Hammond v. Cailleaud*, 111 Cal. 206, 52 Am. St. Rep. 167; and see *Bailey v. Dalrymple*, 47 N. J. Eq. 81; *Harbison v. Timmons*, 139 Ill. 167; *Thriffs v. Fritz*, 101 Ill. 457; *Rout v. King*, 103 Ind. 555.

4 Childress v. Hurt, 2 Swan, 487; Latourette v. Latourette, 25 N. Y. App. Div. 145.

5 Pomeroy v. Allen, 60 Mo. 530; Burden v. Taylor, 124 Mo. 12.

6 Swain v. Morberly, 17 Ind. 99; Swindell v. Richey, 41 Ind. 281; Deputy v. Mooney, 97 Ind. 463.

7 Burgin v. Burgin, 82 N. C. 196.

8 McManus v. Keith, 49 Ill. 388; Bassett v. Lockard, 60 Ill. 164; and see Hammond v. Cailleaud, 111 Cal. 206, 52 Am. St. Rep. 167. Contra, Bolivar v. Zeigler, 9 S. C. 287.

9 See Fuller v. Missroon, 35 S. C. 314; Jordan v. Poillon, 77 N. Y. 518; Fleming v. Burnham, 100 N. Y. 1; Taylor v. Klein, 47 N. Y. App. Div. 343; Miller v. Wright, 109 N. Y. 194; Earle v. Turton, 26 Md. 23; Koehl v. Solari, 47 La. Ann. 890.

10 Crouter v. Crouter, 133 N. Y. 55.

11 Fuller v. Missroon, 35 S. C. 314.

§ 558. Same—Miscellaneous.

The purchaser at a partition sale is bound by all irregularities and defects appearing upon the face of the proceedings.¹ Any sale of land not included in the decree, and any recital of description in the sheriff's deed not warranted by the decree and advertisement of the sale, are without authority of law, and pass no title to such extra portion.² The decree of confirmation has, as to the purchaser, all the force and effect of a final judgment, and upon delivery of the deed his title becomes perfect.³ The parties to the action are concluded by the decree, and it cannot be collaterally attacked unless it is void for fraud or by reason of some jurisdictional defect.⁴ A payment made by a purchaser at a

partition sale to the guardian of one of the minor tenants in common is proper and sufficient under the statute.⁵ But where the land is sold by the sheriff, the securities received by him from the purchaser for the deferred payments belong to the parties entitled under the statute to receive them in lieu of the land, and the sheriff is not authorized by virtue of his office to receive the amount secured thereby, nor to discharge the purchaser from liability to the parties to whom the purchase money is due.⁶

1 Kelly v. Werner, 53 N. Y. Supp. 1067, 34 N. Y. App. Div. 68.

2 Burnham v. Hitt, 143 Mo. 414.

3 Kirk v. Kirk, 137 N. Y. 510; Woodhull v. Little, 102 N. Y. 165.

4 Casey v. Casey, 19 Misc. Rep. 272; Brevoort v. Brevoort, 70 N. Y. 136; Thompson v. Frew, 107 Ill. 478; Moseley v. Hankinson, 25 S. C. 519; Kellam v. Richards, 56 Ala. 238; Hatch v. Ferguson, 68 Fed. Rep. 43.

5 Howerton v. Sexton, 104 N. C. 75.

6 Welsh v. Freeman, 21 Ohio St. 402.

§ 559. Rents and Profits, Improvements, etc.

It is competent on a partition for the court to adjust the equities of the parties, including rent to the excluded tenant.¹ And an accounting for rents and profits during the pendency of partition proceedings up to the date of the decree is held to be proper where the testimony furnishes a sufficient basis therefor.² A tenant in common who makes necessary, valuable, and lasting im-

provements is entitled to compensation therefor on partition.³ This is not a legal right, depending upon a statute, but is a right enforceable in a court of equity, and the fact that the improvements were made after notice of the cotenant's title will not defeat a recovery.⁴ Where a defendant in partition desires to set up a claim for improvements made and taxes paid, it is said to be the better practice to file his counterclaim when he files his answer, and not after a finding has been made on the issue joined on the complaint.⁵ A judgment for rents and profits in ejectment by one cotenant against another may be charged against the share of the latter in a subsequent proceeding for partition.⁶ The fact that when improvements were made on the common property it was in the possession of the holder of an estate for life does not deprive the cotenant making them of his right to be allowed, in a suit for partition by sale, the amount which such improvements enhanced the value of the property, when sold.⁷ In an action for partition the claim of one of the cotenants for compensation for improvements made by him cannot be barred by the statute of limitations.⁸ A cotenant in possession is not entitled, upon partition, to an allowance for insurance claimed to have been paid by him, where it does not in any way appear that the insurance inured to the benefit of the excluded tenant.⁹

1 *Hoffman v. Ross*, 25 Mich. 175; *Fenton v. Miller*, 116 Mich. 45, 72 Am. St. Rep. 502; and see *Van Ormer v. Harley*, 102 Iowa, 150.

2 *Hunt v. Hunt*, 109 Mich. 399.

3 *Parish v. Camplin*, 139 Ind. 1; *Carver v. Coffman*, 109 Ind. 547; *Fenton v. Miller*, 116 Mich. 45, 72 Am. St. Rep. 502; *Leake v. Hayes*, 13 Wash. 213, 52 Am. St. Rep. 34, and note. See, also, *Appeal of Kelsey*, 113 Pa. St. 119, 57 Am. Rep. 444; *Carson v. Broady*, 56 Neb. 648, 71 Am. St. Rep. 691, and note; *Donnor v. Quartermas*, 90 Ala. 164, 24 Am. St. Rep. 778; *Ward v. Ward*, 40 W. Va. 611, 52 Am. St. Rep. 911, and note; sec. 370b, ante.

4 *Alleman v. Hawley*, 117 Ind. 532. See, also, *Van Ormer v. Harley*, 102 Iowa, 150; *Ballou v. Ballou*, 94 Va. 350, 64 Am. St. Rep. 733.

5 *Alleman v. Hawley*, 117 Ind. 532.

6 *Snell v. Harrison*, 131 Mo. 495, 52 Am. St. Rep. 642.

7 *Ward v. Ward*, 40 W. Va. 611, 52 Am. St. Rep. 911.

8 *Ballou v. Ballou*, 94 Va. 350, 64 Am. St. Rep. 733.

9 *Fenton v. Miller*, 116 Mich. 45, 72 Am. St. Rep. 502.

§ 560. Costs.

It has been questioned whether in any case the plaintiff in partition can have his attorneys' fees taxed as a part of the costs.¹ This question was not decided in the case cited, but it is well settled that such fees are not taxable as costs in a partition suit wherein there is a contest. It is held that the statute should be construed as intending the taxation of counsel fees only in cases where the proceedings are amicable.² Where the plaintiffs alone contested the issue raised, and lost, it was held that the trial court

properly taxed the costs against the plaintiffs.³ Where a partition sale is made of property in which a divorced husband and wife are tenants in common, and in which the wife has a homestead interest, it is error to decree that her portion of the costs of the partition suit shall be paid out of the proceeds of the sale, but a personal judgment may be rendered against her for the costs.⁴ Where one of the defendants did not appear at the hearing, and his answer was unsupported by evidence and was assumed by the court to be unnecessary, he was held not entitled to any costs.⁵ In Illinois, although a bill for partition states the rights and interests of the parties correctly, yet if a defense is made of a substantial character, and undertaken with reasonable grounds, the complainant will not be entitled to have his solicitors' fees apportioned under the statute.⁶

1 See *Duncan v. Duncan*, 63 Iowa, 150.

2 *Kilgour v. Crawford*, 51 Ill. 249; *Fidelity etc. Deposit Co.'s Appeal*, 108 Pa. St. 339; *Finch v. Garrett*, 102 Iowa, 381; *Oliver v. Lansing*, 57 Neb. 352.

3 *Appleman v. Appleman*, 140 Mo. 309, 62 Am. St. Rep. 732.

4 *Kirkwood v. Domnan*, 80 Tex. 645, 26 Am. St. Rep. 770.

5 *Shields v. Quigley*, 1 N. B. Eq. Cas. 154.

6 *Metheny v. Bohn*, 164 Ill. 495; *Gilbert v. Wielert*, 87 Ill. App. 290.

§ 561. Partition in Probate Court.

The jurisdiction of courts of probate to decree partition is wholly dependent upon statute.¹ And this jurisdiction does not include authority to make partition of lands, or to order a sale for equitable partition, when an adverse claim or title is asserted in good faith by anyone and brought to the knowledge of the court.² Nor does the partition of property which belongs in part to minors and in part to adults fall within probate jurisdiction.³ And the jurisdiction is confined to lands lying, in whole or in part, in the county in which the application is made.⁴ But it is held that where lands to be divided lie in two counties, partition or sale of them may be made in either of the counties, and that only one set of appraisers is necessary.⁵ Under the California statute (Code Civ. Proc., sec. 1675), partition cannot be made in probate unless the interest of the decedent is an estate in severalty, and the authority to make partition in certain cases of joint tenancy must be confined to a single estate which was the property of the decedent. The court is not intrusted with power to make partition or allotment of property in which strangers have an interest.⁶ In Alabama, in a proceeding in the probate court for partition or sale for partition, only the legal estate is before the court for adjudication, and the court

has no jurisdiction over equitable rights and estates. The equities are not adjudicated.⁷ The probate court has no jurisdiction to decree partition where the lands are not susceptible of division into equal parts, or parts of equal value, and this cannot be done where the parties own unequal interests.⁸ The proceeding for a partition in a court of probate is instituted by petition, and the jurisdiction of the court attaches on the filing of the petition.⁹ The names of all the persons interested in the property, their residences, the interest of each, and the number of shares into which the property is to be divided, must be set forth in the petition. These allegations are generally held to be jurisdictional.¹⁰ It should also be alleged that the decedent died in the county, and that part of his real estate lies therein.¹¹ When the petition contains all necessary averments of fact to give the court jurisdiction, any error committed afterward does not affect the jurisdiction. But, if it shows that the land cannot be equitably partitioned under the limited powers of a court of probate, then its jurisdiction never attaches, and if there be infants, or persons not made parties, whose interests are affected, the proceeding is coram non judice, and void.¹² The commissioners appointed by the court to make partition are not empowered to determine any question of right, title, or interest as between the parties, but this is to be

done by the court preliminary to the judgment for partition.¹³ In a proceeding in the probate court for a sale of lands for partition, where all the parties claiming any interest in the lands are before the court, which acquires jurisdiction of all matters and interests contained in the partition, and the proceeding is in every respect regular and the decree in legal form, and the sale is confirmed, the purchaser at the sale holding a deed executed under the order of the court acquires the legal estate in the lands, upon which he can defend an action of ejectment subsequently brought by parties who had only an equitable estate therein.¹⁴ In partitioning lands, the probate court cannot, unless so authorized by statute, make a division into unequal shares and award a sum of money to equalize them.¹⁵ But the parties in interest may adopt and acquiesce in such partition, taking and holding possession in severalty of the shares allotted to them respectively, and when such possession has been held for a length of time sufficient to establish the fact of such acquiescence, a court of equity will uphold the partition and enforce it in its integrity.¹⁶

1 See *Richardson v. Loupe*, 80 Cal. 490; *Ames v. Ames*, 148 Ill. 321; *Prince v. Clark*, 81 Mich. 167; *Hurley v. Hamilton*, 37 Minn. 160; *Lee v. Henderson*, 75 Tex. 190.

2 *Ballard v. Johns*, 84 Ala. 70; *McEvoy v. Leonard*, 89 Ala. 455.

3 *Benedict v. Florat*, 30 La. Ann. 1337; and see *Prince v. Clark*, 81 Mich. 167.

4 *Turnipseed v. Fitzpatrick*, 75 Ala. 297.

5 *Shull v. Kennon*, 12 Ind. 34. See *Marshall v. Marshall*, 86 Ala. 383.

6 *Buckley v. Superior Court*, 102 Cal. 6, 41 Am. St. Rep. 135; and see *Snyder's Appeal*, 36 Pa. St. 168, 78 Am. Dec. 372; *Matter of Will of Walker*, 136 N. Y. 28.

7 *Caperton v. Hall*, 118 Ala. 265; S. C. before, 83 Ala. 171.

8 *Ward v. Corbett*, 72 Ala. 438; *Terrell v. Cunningham*, 70 Ala. 100.

9 *Morgan v. Farned*, 83 Ala. 367; *Inman v. Prout*, 90 Ala. 362.

10 *Inman v. Prout*, 90 Ala. 362; *Johnson v. Ray*, 67 Ala. 603. See, also, as to contents of petition, *Hanner v. Silver*, 2 Or. 336; *Richardson v. Loupe*, 80 Cal. 490.

11 *Rice v. Rice*, 10 B. Mon. 420.

12 *Whitman v. Reese*, 59 Ala. 532.

13 *Gourley v. Woodbury*, 43 Vt. 89.

14 *Caperton v. Hall*, 118 Ala. 265.

15 *Terrell v. Cunningham*, 70 Ala. 100.

16 *Terrell v. Cunningham*, 70 Ala. 100; *Montgomery v. Gordon*, 51 Ala. 377.

CHAPTER XXXVI.

NUISANCE.

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§ 562. Defined—Nature of.

A nuisance is an injury to the public, or to others, and not an injury or annoyance which a person causes to himself and family.¹ A private nuisance is defined by Blackstone to be anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another.² And it is held that any unwarrantable, unreasonable, or unlawful use by a person of his own property, real or personal, to the injury of another, comes within this definition, and renders the owner or possessor liable for all damages arising from such use.³ Nuisance is said to be a use of property or a course of conduct which violates a duty of good neighborhood.⁴ But in order to create a nuisance from the use of property, the use must be such as to produce a tangible and appreciable injury to neighboring property, or such as to render its enjoyment specially uncomfortable or inconvenient. Matters causing annoyance by being merely disagreeable or unsightly are not nuisances.⁵ The distinction between nuisances which are such per se and those uses which be-

come nuisances by reason of the manner and character of the use, or the place, has long been recognized by the authorities.⁶ Unless the thing, of itself because of its inherent qualities, without complement, is productive of injury, or, by reason of the manner of its use or exposure, threatens or is dangerous to life or property, it cannot be said to be a nuisance per se at common law. Thus, if an occupation be lawful, and by care and precaution it can be conducted without danger or inconvenience to another, the occupation is not per se a nuisance, and if such an occupation or business becomes a nuisance, it is because of a want of proper care or precaution.⁷ It is said that if the thing sought to be prohibited is a nuisance per se, the court will interfere to stay irreparable mischief without waiting for the result of a trial. But when the thing sought to be restrained is not unavoidably and in itself noxious, but only something which may, according to circumstances prove so, then the court will refuse to interfere.⁸ The difference between public and private nuisances does not consist in any difference in the nature or character of the thing itself, but a nuisance is public when the danger is to the public, and private when the danger is to an individual as distinguished from the public.⁹ The remedy for a public nuisance is by indictment.¹⁰ But private nuisances are actionable,

either for their abatement or for damages, or both.¹¹ The California statute (Code Civ. Proc., sec. 731) defines an actionable nuisance to be "anything which is injurious to health or indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property."¹² A public nuisance is defined to be "one which affects, at the same time, an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal."¹³ Every nuisance not included in the last definition is private.¹⁴ It is also provided that "nothing which is done or maintained under the express authority of a statute can be deemed a nuisance."¹⁵ It is said that the question whether any particular object constitutes a nuisance or not must depend upon the conditions and circumstances in each particular case. And no two cases being precisely alike, it is rare that one case can be a binding precedent for another.¹⁶

1 *State v. Hord*, 122 N. C. 1092, 65 Am. St. Rep. 743. See *Durfee v. Granite etc. Min. Co.*, 13 Mont. 181, 183.

2 3 Blackstone's Commentaries, 216; approved in *Burditt v. Swenson*, 17 Tex. 489, 67 Am. Dec. 665.

3 *Heeg v. Licht*, 80 N. Y. 579, 36 Am. Rep. 654; *Laffin etc. Powder Co. v. Tearney*, 131 Ill. 322, 19 Am. St. Rep. 34; *Sullivan v. Waterman*, 20 R. I. 372. See,

also, in this connection, *Barnes v. Hathorn*, 54 Me. 124; *State v. Taylor*, 29 Ind. 517; *Butterfield v. Klaber*, 52 How. Pr. 255; *Susquehanna Fertilizer Co. v. Malone*, 73 Md. 276, 25 Am. St. Rep. 595; *Rounsaville v. Kohlheim*, 68 Ga. 668, 45 Am. Rep. 505; *Stilwell v. Riding Academy*, 21 Abb. N. C. 472.

4 25 Abb. N. C. 199, note.

5 See *Keiser v. Lovett*, 85 Ind. 240; *Hoadley v. Seward*, 71 Conn. 640; *Campbell v. Seaman*, 63 N. Y. 568, 20 Am. Rep. 567; *Sparhawk v. Railroad Co.*, 54 Pa. St. 401; *Shivery v. Streeper*, 24 Fla. 103; *Euler v. Sullivan*, 75 Md. 616, 32 Am. St. Rep. 420; *Bristol etc. Lumber Co. v. Bristol*, 97 Va. 304, 309, 75 Am. St. Rep. 783; *Railroad Co. v. Marchant*, 119 Pa. St. 541, 4 Am. St. Rep. 659; *Salvin v. Coal Co.*, L. R. 9 Ch. 705; *St. Helen's Smelting Co. v. Tipping*, 11 H. L. Cas. 642; sec. 562, ante.

6 See *St. James' Church v. Arrington*, 36 Ala. 546, 76 Am. Dec. 332; *Rouse v. Martin*, 75 Ala. 510, 51 Am. Rep. 463.

7 *Kinney v. Koopman*, 116 Ala. 310, 67 Am. St. Rep. 119; and see *Wier's Appeal*, 74 Pa. St. 230; *Van De Vere v. Kansas City*, 107 Mo. 83, 28 Am. St. Rep. 396; *Fairbanks v. Kerr*, 70 Pa. St. 86, 10 Am. Rep. 664; *Waupun v. Moore*, 34 Wis. 450, 17 Am. Rep. 446.

8 *Lord Brougham*, in *Earl of Ripon v. Hobart*, 3 Mylne & K. 169.

9 *Kinney v. Koopman*, 116 Ala. 310, 67 Am. St. Rep. 119; and see *Attorney General v. Booming Co.*, 34 Mich. 462; *King v. Railroad Co.*, 18 N. J. Eq. 397; *Westcott v. Middleton*, 43 N. J. Eq. 478; *Nolan v. New Britain*, 69 Conn. 668; *Soltan v. De Held*, 2 Sim., N. S., 133.

10 *Rung v. Shoneberger*, 2 Watts, 23, 26 Am. Dec. 95; *Mayor v. Marriott*, 9 Md. 160, 66 Am. Dec. 326; *Commonwealth v. Smith*, 6 Cush. 80.

11 *Kinney v. Koopman*, 116 Ala. 310, 67 Am. St. Rep. 119.

12 See, also, Cal. Civ. Code, sec. 3479; *Grandona v. Lovdal*, 78 Cal. 611, 12 Am. St. Rep. 121. So declared by the Indiana statute: See *State v. Taylor*, 29 Ind. 517.

13 Cal. Civ. Code, sec. 3480.

14 Cal. Civ. Code, sec. 3481.

15 Cal. Civ. Code, sec. 3482. See, also, *Commonwealth v. Railroad Co.*, 27 Pa. St. 339, 67 Am. Dec. 471; *Saltonstall v. Banker*, 8 Gray, 195.

16 *Lynn v. Hooper*, 93 Me. 46, Savage, J.

§ 563. Same—Elements of Nuisance, etc.

An act, legal in itself, violating no right, cannot be made actionable on the ground of the motive which induced it.¹ The worst intentions cannot make an act a nuisance where it otherwise is not, and the best intentions cannot prevent an act from being a nuisance where it otherwise is such.² The real question in all the cases is, whether the annoyance substantially interferes with the comforts of human existence and the enjoyment of property.³ If the thing be a nuisance per se, and injury results to another's premises, no rule of law requires evidence of negligence.⁴ If it is sought to hold one accountable for the consequences of acts done by him upon his own land, the question, in general, is not whether he exercised due care, but whether his acts caused the damage. If they necessarily tend to injure his neighbor in his pre-existing rights of property, he is liable in damages for the natural and necessary consequences thereof, irrespective of any considerations as to the care and skill with which such operations may have been conducted.⁵ Nor, in prosecutions or actions for nuisance, will the law balance conveniences. The fact that the thing

complained of furnishes, upon the whole, a greater convenience to the public than it takes away, affords no justification for the continuance of the nuisance.⁶ And in respect to the suitability of location, it is said that as regards trades and business which generally produce ill-effects upon the owners of adjacent property, such as tanneries, smelting works, rendering and soap factories, and the like, and denominated *prima facie* nuisances, the weight of authority is to the effect that no place can be held convenient for carrying on such trades or business when injury results therefrom to others.⁷ But in respect of a business or trade which produces merely annoyance and physical discomfort, but which is not hurtful in character—that is, injurious to health or threatening to life—the rule is not applied with the same strictness.⁸ If the business is lawful, the injury complained of must be shown to have been real and substantial, and not a trifling annoyance, such as is necessarily incident to the business complained of.⁹ It has been held that if a noxious trade be already established in a place remote from habitations and public roads, and persons afterward come and build houses, and a public road is made near to it, the trade, though otherwise a nuisance, may be continued with impunity, because it was legal at its commencement.¹⁰ But this doctrine has not been

accepted as the law, and it has been held that carrying on a noxious or offensive trade for twenty years in a place remote from buildings and public roads does not entitle the party to continue it in the same place after houses have been built and roads laid out in the neighborhood.¹¹ One person cannot erect a nuisance upon his land adjoining vacant land owned by another, and thus measurably control the use to which his neighbor's land may in the future be subjected. And the fact that the nuisance in the particular case complained of was erected prior to the time when the plaintiffs built upon the neighboring lots is no reason for denial of relief in equity.¹²

1 South Royalton Bank v. Suffolk Bank, 27 Vt. 505.

2 Bonnell v. Smith, 53 Iowa, 281; and so, to same effect, Mahon v. Brown, 13 Wend. 261, 28 Am. Dec. 461.

3 Mulligan v. Elias, 12 Abb. Pr., N. S., 259, 264.

4 Kinney v. Koopman, 116 Ala. 310, 67 Am. St. Rep. 119, 125. and note.

5 Cahill v. Eastman, 18 Minn. 324, 10 Am. Rep. 184; McAndrews v. Collierd, 42 N. J. L. 189, 36 Am. Rep. 508; Moses v. State, 58 Ind. 185; and see Beatrice Gas Co. v. Thomas, 41 Neb. 662, 43 Am. St. Rep. 711. Negligence and nuisance distinguished: See Fisher v. Rankin, 25 Abb. N. C. 191, and note; Wasson v. Pettit, 49 Hun, 166, 16 N. Y. St. Rep. 778; Splittorf v. State, 108 N. Y. 205; Dickinson v. Mayor etc., 92 N. Y. 584; Jennings v. Van Schaick, 20 Abb. N. C. 324.

6 Seacord v. People, 121 Ill. 623; Hart v. Mayor etc., 9 Wend. 571, 24 Am. Dec. 165; State v. Kaster, 35 Iowa, 221; Chute v. State, 19 Minn. 271; Rex v. Ward, 4 Ad. & E. 384.

7 Seacord v. People, 121 Ill. 623. See Kinney v. Koopman, 116 Ala. 310, 67 Am. St. Rep. 119, and note;

Robb v. Carnegie, 145 Pa. St. 324, 27 Am. St. Rep. 694.

8 See Catlin v. Valentine, 9 Paige, 575, 38 Am. Dec. 567; Cahill v. Eastman, 18 Minn. 324, 10 Am. Rep. 184; McKeon v. Sec, 51 N. Y. 300; Fletcher v. Ryland, L. R. 3 H. L. Cas. 330; St. Helen's Smelting Co. v. Tipping, L. R. 11 H. L. Cas. 642.

9 Price v. Grantz, 118 Pa. St. 402, 4 Am. St. Rep. 601; Pennsylvania R. R. Co. v. Marchant, 119 Pa. St. 541, 4 Am. St. Rep. 659.

10 Rex v. Cross, 2 Car. & P. 484; Ellis v. State, 7 Blackf. 534.

11 Commonwealth v. Upton, 6 Gray, 473. And so, to same effect, Brady v. Weeks, 3 Barb. 157; Campbell v. Seaman, 63 N. Y. 568, 20 Am. Rep. 567; Angel v. Railroad Co., 38 N. J. Eq. 58; Ashbrook v. Commonwealth, 1 Bush, 139, 89 Am. Dec. 616; Boston Rolling Mills v. Cambridge, 117 Mass. 396; Central R. R. v. English, 73 Ga. 366; Crosby v. Bessey, 49 Me. 539, 77 Am. Dec. 271; Perrine v. Taylor, 43 N. J. Eq. 128; Sturges v. Bridgman, L. R. 11 Ch. 865; Tipping v. Smelting Co., L. R. 1 Ch. 66.

12 Bushnell v. Robeson, 62 Iowa, 540; Fertilizer Co. v. Malone, 73 Md. 268, 25 Am. St. Rep. 595. Compare Edwards v. Mining Co., 38 Mich. 46, 31 Am. Rep. 301.

§ 564. Prescription.

No one can acquire by lapse of time and continuous user the prescriptive right to maintain a public nuisance.¹ As against a public nuisance no statute of limitations applies.² And if a party may acquire a prescriptive right to continue a private nuisance, it can only be by continuous use for twenty consecutive years. No acquiescence short of that period will bar one from complaining of a nuisance, unless by some act or omission he has induced the party causing the

nuisance to incur large expenditures, or to take some action upon which an estoppel may be based.³ The burden of proving a prescriptive right to maintain a nuisance rests upon the party asserting the right, and the strictest proof is required.⁴

1 *Mills v. Hall*, 9 Wend. 315, 24 Am. Dec. 160; *Morton v. Moore*, 15 Gray, 573; *Pittsburg v. Epping-Carpenter Co.*, 194 Pa. St. 318; *De Laney v. Blizzard*, 7 Hun, 7; *Woodruff v. Mining Co.*, 18 Fed. Rep. 753; *State v. Rankin*, 3 S. C. 438, 16 Am. Rep. 737; *State v. Railway Co.*, 86 Ind. 114; *New Salem v. Mill Co.*, 138 Mass. 8; *Nolan v. New Britain*, 69 Conn. 668; *State v. Franklin Falls Co.*, 49 N. H. 240, 6 Am. Rep. 513; *Van Rensselaer v. Albany*, 15 Abb. N. C. 457.

2 *People v. Cunningham*, 1 Denio, 536, 43 Am. Dec. 709; *Dygert v. Schenck*, 23 Wend. 448, 35 Am. Dec. 575; *Patten v. Elevated R. R. Cases*, 3 Abb. N. C. 306, 324.

3 *Campbell v. Seaman*, 63 N. Y. 568, 20 Am. Rep. 567; *North Point Irr. Co. v. Canal Co.*, 16 Utah, 246, 67 Am. St. Rep. 607. See, also, *Postlethwaite v. Payne*, 8 Ind. 104; *Stein v. Burden*, 24 Ala. 130, 60 Am. Dec. 453; *Prentice v. Geiger*, 9 Hun, 350; *Horner v. Stillwell*, 35 N. J. L. 307; *Winship v. Hudspeth*, 10 Ex. 5; *Fertilizer Co. v. Malone*, 73 Md. 268, 25 Am. St. Rep. 595.

4 *McCallum v. Water Co.*, 54 Pa. St. 40, 93 Am. Dec. 656; and see *Ball v. Ray*, L. R. 8 Ch. 467.

§ 565. Authorized Work or Enterprise.

A public nuisance must be occasioned by acts done in violation of law, and a work or enterprise authorized by the legislature cannot be deemed a public nuisance.¹ It is said to be a legal solecism to call that a public nuisance which is maintained

by public authority.² Nothing that is legal in its creation can be a nuisance per se, and much less can that which public necessity demands be a nuisance. Thus, a jail in a populous city, being a public necessity, and authorized by law, is in no legal sense a nuisance.³ So works of internal improvement generally erected by the state, for the benefit of the citizens at large, do not become a public nuisance, because they may render the neighborhood unhealthy by reason of their erection, nor is their character changed by a transfer into the hands of a private corporation, with a requirement that the works shall be kept up for the purposes of their creation.⁴ If the work is lawful in itself, and cannot be carried on elsewhere than where nature located it, or where public necessity requires it to be, then those liable to receive injury from it have a right only to demand that it shall be conducted with all due care, so as to give as little annoyance as may be reasonably expected, and any injury that may result, notwithstanding such care in the management of the work, must be borne without compensation.⁵ To entitle a party to damages in this class of cases it must be made to appear that, in the construction of the improvement, the authorities have been guilty of negligence, or omission of duty, or negligent commission of an act authorized by law.⁶ But it is well settled

that the doing of a lawful act in an illegal and wrongful manner may cause the thing done to be treated as a public nuisance.⁷ And a work or improvement authorized by the legislature, if executed in an unauthorized manner or in an unauthorized place, is a nuisance. Thus, a railroad authorized to be constructed at one place, if constructed in another, is a nuisance.⁸ So a railroad in the streets of a city is not of itself a nuisance, but an improper or unreasonable exercise of a right to use a street by a railroad company may become a nuisance.⁹ The legislature has no power to authorize the maintenance of a nuisance for the promotion of private objects. The maintenance of a nuisance to real estate amounts to a taking of property, and cannot be legalized by the legislature for private purposes even upon terms of making compensation.¹⁰ The legislature has power to declare places or property used to the detriment of public interests or the injury of the health, morals, or welfare of the community, public nuisances, although not such at common law.¹¹ But this power cannot be used as a cover for withdrawing property from the protection of the law, or arbitrarily, where no public right or interest is involved. And if the court can judicially see that the statute is a mere evasion, or was framed for the purpose of individual oppression, it will be set aside as

unconstitutional.¹² It is held by the Michigan courts that the legislature cannot authorize a municipality to make that a purpresture or nuisance which is not so in fact, if, by so doing, the constitutional rights of any citizen in his person or property are destroyed or infringed.¹³ It has also been held that the legislature cannot constitutionally declare an act or thing to be a common nuisance which palpably, according to our present experience or information, is not, and cannot be, under any circumstances, a common nuisance by a common-law definition or common-law decision.¹⁴ Under the provisions of the California statute (Civ. Code, sec. 3482), defining nuisances, acts otherwise constituting a nuisance cannot be justified and legalized by implication, but only by the express authority of some statute.¹⁵

1 *Fletcher v. Railroad Co.*, 25 Wend. 463; *Stoudinger v. Newark*, 28 N. J. Eq. 446; *Vason v. Railroad Co.*, 42 Ga. 637; *Danville etc. R. R. Co. v. Commonwealth*, 73 Pa. St. 29; *Johnson v. Railroad Co.*, 10 R. I. 365; *State v. Barnes*, 20 R. I. 525; *Bedford v. Coggeshall*, 19 R. I. 313; *Omaha v. Flood*, 57 Neb. 124.

2 *Harris v. Thompson*, 9 Barb. 350.

3 *Bacon v. Walker*, 77 Ga. 338; *Long v. Elberton*, 109 Ga. 28; and see *Bessonies v. Indianapolis*, 71 Ind. 189.

4 *Commonwealth v. Reed*, 34 Pa. St. 275, 75 Am. Dec. 661; *Fair v. Philadelphia*, 88 Pa. St. 309, 32 Am. Rep. 455; *Transportation Co. v. Chicago*, 99 U. S. 635.

5 *Barnard v. Sherley*, 135 Ind. 547, 41 Am. St. Rep. 454; and see *Pennsylvania R. R. Co. v. Marchant*, 119 Pa. St. 541, 4 Am. St. Rep. 659; *Gannon v. Hargadon*, 10 Allen, 106, 87 Am. Dec. 625; *Gibson v. Puchta*, 33

Cal. 310; *Parker v. Larsen*, 86 Cal. 236, 21 Am. St. Rep. 30.

6 *Pause v. Atlanta*, 98 Ga. 92, 103. 58 Am. St. Rep. 290; *Louisville v. Mill Co.*, 3 Bush, 416, 96 Am. Dec. 243; *Lee v. Iron Co.*, 57 Me. 481, 2 Am. Rep. 59; and see *Grey v. Mayor etc.* (N. J. Ct. of Er. & App.), 45 Atl. Rep. 995.

7 *Owen v. Phillips*, 73 Ind. 284.

8 *Commonwealth v. Railroad Co.*, 27 Pa. St. 339, 67 Am. Dec. 471; and see *Attorney General v. Railroad Co.*, 24 N. J. Eq. 49; *Rex v. Pease*, 4 Barn. & Adol. 30.

9 *State v. Louisville etc. Ry. Co.*, 86 Ind. 114.

10 *Pennsylvania R. R. Co. v. Angel*, 41 N. J. Eq. 316, 56 Am. Rep. 1; *Beach v. Iron etc. Co.*, 54 N. J. Eq. 65; *Chicago etc. Ry. Co. v. First M. E. Church*, 102 Fed. Rep. 85; and see *Matter of Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *Bohm v. Railway Co.*, 129 N. Y. 576; *Pumpelly v. Green Bay Co.*, 13 Wall. 166; *Dwyckinck v. Railroad Co.*, 125 N. Y. 710; *Nynehamer v. People*, 13 N. Y. 378; *Fisher v. McGirr*, 1 Gray, 1, 61 Am. Dec. 381.

11 *Lawton v. Steele*, 119 N. Y. 226, 16 Am. St. Rep. 813; *People v. West*, 106 N. Y. 293, 60 Am. Rep. 452; *Barker v. People*, 3 Cow. 686, 15 Am. Dec. 322.

12 *Lawton v. Steele*, 119 N. Y. 226, 16 Am. St. Rep. 813; *Mugler v. Kansas*, 123 U. S. 661.

13 *Grand Rapids v. Powers*, 89 Mich. 94, 28 Am. St. Rep. 276; *People v. Armstrong*, 73 Mich. 288, 16 Am. St. Rep. 578; and see *Tissot v. Telephone Co.*, 39 La. Ann. 996, 4 Am. St. Rep. 248, and note; *Ex parte O'Leary*, 65 Miss. 80, 7 Am. St. Rep. 640, and note; *Baumgartner v. Hasty*, 100 Ind. 575, 50 Am. Rep. 830. Compare *Easton etc. Ry. Co. v. Easton*, 133 Pa. St. 505, 19 Am. St. Rep. 658, and note.

14 *Coe v. Schultz*, 47 Barb. 64; *First Nat. Bank v. Sarlls*, 129 Ind. 201, 28 Am. St. Rep. 185.

15 *Woodruff v. Mining Co.*, 18 Fed. Rep. 753.

§ 566¹. Purpresture.

A purpresture is briefly defined as an unauthorized encroachment upon, and appropriation

of, land or water which is common and public.¹ It is also defined as an inclosure by a private party of a part of that which belongs to and ought to be open and free to the enjoyment of the public at large.² A purpresture is not necessarily a public nuisance. The latter must be something which subjects the public to some degree of inconvenience or annoyance, but the former may exist without putting the public to any inconvenience whatever, as where part of a common highway is inclosed, provided the appropriation is confined to a part never made use of for purposes to which the highway is devoted.³ Purprestures are indictable.⁴ And courts of equity have jurisdiction in cases of purpresture. Thus, if the inclosure of a highway is threatened, whereby public travel is in danger of being interrupted, and great numbers of citizens are liable to be subjected to petty loss and annoyance by reason of such obstruction, a resort to chancery is proper, and is more effectual than the remedy at law.⁵ So if persons build a fence partly on their own land and partly on lands belonging to the government, whether the act be technically a purpresture or simply a public nuisance, an action may be maintained in equity to compel, by mandatory injunction, the removal of the fence from the government land.⁶ But this equitable jurisdiction will not be exercised

when the obstruction is of such a character that it may with equal facility be removed by a resort to the usual legal remedies.⁷

1 Moore v. Jackson, 2 Abb. N. C. 211, 214.

2 Attorney General v. Booming Co., 34 Mich. 462, 472; Grand Rapids v. Powers, 89 Mich. 94, 28 Am. St. Rep. 276, 288. Other definitions: See Attorney General v. Utica Ins. Co., 2 Johns, Ch. 371, 381; Drake v. Railroad Co., 7 Barb. 508, 548; Columbus v. Jacques, 30 Ga. 506, 512; Attorney General v. Chamberlaine, 4 Kay & J. 292.

3 Attorney General v. Booming Co., 34 Mich. 462; and see Commonwealth v. Wilkinson, 16 Pick. 175, 26 Am. Dec. 654.

4 See State v. Atkinson, 24 Vt. 448; State v. Yarell, 12 Ired. 130; State v. Narrows Island Club, 100 N. C. 477; Commonwealth v. Wilkinson, 16 Pick. 175, 26 Am. Dec. 654.

5 Craig v. People, 47 Ill. 487.

6 United States v. Brighton Rancho Co., 26 Fed. Rep. 218; and see State v. Goodnight, 70 Tex. 682.

7 Attorney General v. Brick Co., 115 Mass. 431; Attorney General v. Railway Co., 125 Mass. 515, 28 Am. Rep. 264; Attorney General v. Railroad Co., 3 N. J. Eq. 136.

§ 567. Nuisance by Pollution of Water.

It is stated as a general principle that damages resulting to another from the natural and lawful use of his land by the owner thereof are, in the absence of malice or negligence, *damnum absque injuria*.¹ It is accordingly held that one who operates a mine in the ordinary and usual manner may, upon his own lands, drain or pump the water which percolates into his mine into a stream which forms the natural drainage of

the basin in which the mine is located, although the quantity of the water may thereby be increased and its quality so affected as to render it totally unfit for domestic purposes by the lower riparian owners.² But the general right of a riparian proprietor to have the waters of a stream come to him in its natural condition is well established.³ And in a suit by a riparian proprietor to restrain the defendant from polluting the stream by discoloration, it was held to be no defense or equitable excuse that the discoloration was the natural and necessary result of mining operations conducted in the usual manner.⁴ And it was held that one who manufactures coke from coal not mined on his own land is liable in damages to a lower proprietor for the pollution of a stream as a necessary incident to the process of manufacture.⁵ It is a nuisance to throw from day to day into water, used for the ordinary purposes of life, any substance that detracts from its purity and excites disgust in those who use the water.⁶ So a deleterious substance placed or negligently allowed to remain where the waters of another used for domestic purposes may be corrupted, is a nuisance.⁷ So if the damming of water, though in accordance with a prescriptive right, works hurt, inconvenience, or damage to another, by creating pools of stagnant or putrid water, or in any manner creating or causing such

annoyance as seriously to interfere with the comfortable enjoyment of his property, or if it has a direct and decided tendency to cause sickness in his family or immediate neighborhood, it is a nuisance of which he may complain.⁸ The fact that a stream is also fouled by others, or that other independent causes are already operating to pollute the water, is no answer either to an action or indictment for the nuisance.⁹ If many persons are engaged in mining on a small stream, and each deteriorates the water a little, so that the combined acts of all render it utterly unfit for use, each cannot successfully defend on the ground that his act alone did not materially affect the water.¹⁰ The discharge of impure water, such as that which has been mixed with alkali or other injurious substances, into a canal whose waters are used for irrigation or other useful purposes, is held to create a nuisance.¹¹ The owner of land has the right to appropriate underground water on his premises, and thus prevent its use by another, but he has no right to pollute, contaminate, or poison it, however innocently, so that when it reaches his neighbor's land it is in such condition as to be unfit for use, either by man or beast. And if he does so, and thereby pollutes his neighbor's well, he is liable for the damages sustained, and in order to recover such damages it is enough that

the pollution was the natural and probable consequence of the defendants' acts. It is unnecessary that the fact of contamination was known to the defendant.¹² The pollution of a water-course with the sewage of a city, in the absence of a legal right to do so, constitutes a public nuisance, and the city may be held liable in damages to a lower owner who is specially injured thereby.¹³

1 See *Roath v. Driscoll*, 20 Conn. 533, 52 Am. Dec. 352; *Frazier v. Brown*, 12 Ohio St. 294; *Hauck v. Pipe Line Co.*, 153 Pa. St. 366, 34 Am. St. Rep. 710; *Davis v. Whitney*, 68 N. H. 66; *Ladd v. Brick Co.*, 68 N. H. 185.

2 *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. St. 126, 57 Am. Rep. 445. See sec. 417, ante.

3 *Gardner v. Newburgh*, 2 Johns. Ch. 162, 166, 7 Am. Dec. 526; *Woodycar v. Shaefer*, 57 Md. 1, 40 Am. Rep. 419; *Acquackamont Water Co. v. Watson*, 29 N. J. Eq. 368; *Clark v. Railroad Co.*, 145 Pa. St. 438, 27 Am. St. Rep. 710; *Attorney General v. Lunatic Asylum*, L. R. 4 Ch. 146; *Crossley v. Lightowler*, L. R. 3 Eq. 279; and see sec. 421, ante.

4 *Beach v. Sterling etc. Zinc Co.*, 54 N. J. Eq. 65; and see, also, *Columbus etc. Iron Co. v. Tucker*, 48 Ohio St. 41, 29 Am. St. Rep. 528; *Robinson v. Coal Co.*, 57 Cal. 412, 40 Am. Rep. 118; *Young v. Bankier* (1893), L. R. App. Cas. 691.

5 *Lentz v. Carnegie*, 145 Pa. St. 612, 27 Am. St. Rep. 717, and note.

6 *Lewis v. Stein*, 16 Ala. 214, 50 Am. Dec. 177.

7 *Woodward v. Aborn*, 35 Me. 271, 58 Am. Dec. 699; and see, to same effect, *Greene v. Nunnemacher*, 36 Wis. 50; *Ball v. Nye*, 99 Mass. 582, 97 Am. Dec. 56; *Brown v. Illius*, 25 Conn. 583; *Attorney General v. Steward*, 20 N. J. Eq. 415; *Ballard v. Tomlinson*, L. R. 26 Ch. 194.

8 *Rhodes v. Whitehead*, 27 Tex. 304, 84 Am. Dec.

631; and see *Mills v. Hall*, 9 Wend. 315, 24 Am. Dec. 160; *Story v. Hammond*, 4 Ohio, 376; *Chapman v. Rochester*, 110 N. Y. 273, 6 Am. St. Rep. 366.

9 *Crossley v. Lightowler*, L. R. 2 Ch. 478, 481; *St. Helen's Smelting Co. v. Tipping*, 11 H. L. Cas. 642; *Attorney General v. Leeds*, L. R. 5 Ch. 583; *Beach v. Sterling etc. Zinc Co.*, 54 N. J. Eq. 65; *Attorney General v. Steward*, 20 N. J. Eq. 415; *Cleveland v. Gas Co.*, 20 N. J. Eq. 201; *Meigs v. Lister*, 23 N. J. Eq. 199.

10 *Hill v. Smith*, 32 Cal. 166.

11 *North Point Irr. Co. v. Canal Co.*, 16 Utah, 246, 67 Am. St. Rep. 607; *Mann v. Mining Co.*, 49 N. Y. App. Div. 454.

12 *Kinnaird v. Standard Oil Co.*, 89 Ky. 468, 25 Am. St. Rep. 545; *Beatrice Gas Co. v. Thomas*, 41 Neb. 662, 43 Am. St. Rep. 711, and note. See sec. 417, ante.

13 *Nolan v. New Britain*, 69 Conn. 668.

§ 568. Storing Dangerous Materials on Premises.

It has been held that the erection of a powder magazine in a populous part of a city, and keeping stored therein large quantities of gunpowder, is per se a nuisance.¹ If actual injury results from the keeping of gunpowder or other dangerous explosive, the person keeping it will be liable, although the explosion is not chargeable to his personal negligence. The question of care or want of care is held not to be involved in the case.² The owner of powder mills and works is held to be answerable for all damages done to person or property by their explosion, whether negligent or not, if they are so situated that such an explosion would probably involve injury to

the person or property of third persons.³ There are, however, on the other hand, well-considered decisions to the effect that the storing and keeping of explosives, such as gunpowder and dynamite, in large quantities near dwellings in a thickly settled portion of a city, and near a public street, is not a nuisance per se. And that, in order to constitute such keeping a nuisance and impose liability for an accidental explosion, there must be negligence in the keeping, or in the manner of keeping and storing the explosive.⁴ And where damages resulted to the plaintiff from an explosion of dynamite then on a car in the defendant's yard, it was held that the burden was on the plaintiff to show that the place where the dynamite was stored was an improper one.⁵

1 *Cheatham v. Shearon*, 1 Swan. 213, 55 Am. Dec. 734; *Cameron v. Kenyon-Connell Com. Co.*, 22 Mont. 312, 74 Am. St. Rep. 602.

2 *Lafin etc. Powder Co. v. Tearney*, 131 Ill. 322, 19 Am. St. Rep. 34; and see, to same effect, *Myers v. Malcolm*, 6 Hill, 292, 41 Am. Dec. 744; *Phinizy v. Augusta*, 47 Ga. 263; *Wier's Appeal*, 74 Pa. St. 230; *McAndrews v. Collard*, 42 N. J. L. 189, 36 Am. Rep. 608; *Heeg v. Licht*, 80 N. Y. 579, 36 Am. Rep. 654; *Emory v. Powder Co.*, 22 S. C. 476, 53 Am. Rep. 730; *Coumminge v. Stevenson*, 76 Tex. 642.

3 *Wilson v. Phoenix etc. Mfg. Co.*, 40 W. Va. 413, 52 Am. St. Rep. 890. See, also, *Judson v. Giant Powder Co.*, 107 Cal. 549, 48 Am. St. Rep. 146.

4 *People v. Sands*, 1 Johns. 78, 3 Am. Dec. 296; *Kinney v. Koopman*, 116 Ala. 310, 67 Am. St. Rep. 119, and cases cited in note; and see *Cosulich v. Standard Oil Co.*, 122 N. Y. 118, 19 Am. St. Rep. 475.

5 *Walker v. Chicago etc. Ry. Co.*, 71 Iowa, 658.

§ 569. Instances of Nuisance—Miscellaneous.

A lawful trade may, by reason of its being carried on at unusual hours or in close proximity to a dwelling-house, by reason of noise and other incidents of it, constitute a nuisance. Each case must, however, depend upon the particular circumstances which characterize it, and no more definite rule can be given than that the noise and other incidents of the business must be such as would be likely to cause some actual, material, physical discomfort to a person of ordinary sensibilities. The nature of the trade, the kind of noise, and all of the attending circumstances must be taken into consideration.¹ It is held that an electric light plant which, although it makes a buzzing noise and is operated late into the night, does not cause any material discomfort or injury to a neighboring resident or any material damage to his property, will not be abated as a nuisance.² Placing or maintaining a building, stones, or other obstructions in a public highway, without lawful authority, is a nuisance at common law.³ So of steps projecting from a house into a highway so as to obstruct it.⁴ And trees whose branches extend over the land of another are a nuisance to the extent that the branches overhang the adjoining land, and the owner of such adjoining land may have an abatement of the nuisance.⁵ Branches of trees standing upon land

adjoining a railroad company's right of way, and overhanging it to such an extent that at times they brush against the faces of the company's engineers and obscure their view when their duties require them to maintain a lookout, are a nuisance, which the company may abate without notice to the adjoining landowner.⁶ As a general rule, any obstruction of a street or encroachment thereon which interferes with its use by the public for travel and transportation is a public nuisance. There are, however, exceptions to the general rule, born of necessity and justified by public convenience. Thus, an abutting owner engaged in building may temporarily encroach upon the street by the deposit of building materials.⁷ So a tradesman may convey goods from a street to his adjoining store, and from the store to the street, and for that purpose may temporarily obstruct passage on the sidewalk. But the obstruction must not only be necessary, with reference to the business of the tradesman, but also reasonable with reference to the rights of the public.⁸ A fence out of repair on the premises of a landowner may become a public nuisance.⁹ And although the act of setting spring guns and traps on one's own premises for their protection is not in itself unlawful, yet the person doing it may be responsible for injuries caused thereby to individuals, and may be in-

dictable for the erection of a nuisance if the public are subjected by it to any danger.¹⁰ The use of property in such a way as tends to collect disorderly crowds or loungers is per se a nuisance.¹¹ But it was held that public picnics and dances are not in their nature nuisances, and that an ordinance declaring them to be such is void.¹² Offensive odors constitute a well-recognized class of nuisances.¹³ And the existence of such odors which make life highly uncomfortable and disagreeable for the occupants of rented houses is in itself an injury to the property rights of their owner.¹⁴ A tomb erected upon one's own land is not necessarily a nuisance to his neighbor, but may become such from locality and extraneous facts.¹⁵ A pesthouse maintained in the vicinity of a city and adjoining a tract of land which has been divided into building lots, many of which have been sold, and upon several of which buildings have been erected for use as residences, may be enjoined as a nuisance.¹⁶ But it is held that if the pesthouse is in a suitable place when erected and first used, persons who subsequently locate near it are not entitled to abate it.¹⁷ A dog, however vicious, kept on one's own premises is not a nuisance per se, for the reason that it cannot work hurt to another. But if the dog escapes, and, upon the highway or upon the private premises of another, commits

an injury, the owner is liable.¹⁸ Where a mill pond, which has existed for many years, becomes a public nuisance, by corrupting the air, causing disagreeable smells and sickness, the owner is liable.¹⁹ But it is held that if a pond accumulates upon land from natural causes, and in process of evaporation emits noxious and deleterious gases, injurious to the public health and to the health of persons residing in the vicinity, the owner cannot be held liable for creating or maintaining a nuisance, when he has not, by his own act or negligence, contributed to bring about the alleged nuisance.²⁰ A person may erect a building for a useful purpose, such as a coal and wood house, anywhere on his own premises, although so near the premises of another as to shut off a portion of the light, and the building is not a nuisance though so located maliciously.²¹ But the same court held that a fence erected maliciously, and with no other purpose than to shut out the light and air from a neighbor's window, was a nuisance, the decision being placed upon the ground that the fence served no useful purpose, and was erected solely from a malicious purpose.²² A cooking range or stove erected so near to the partition wall of two houses as to injure, by its ordinary use, the goods of the adjacent proprietor, and render his house uncomfortable and disagreeable, was held to be a nuisance.²³ Any occupation of property ded-

icated to public use inconsistent with the public right is a nuisance.²⁴ In the absence of legislative authority, the construction and use by a railway company of its road longitudinally on a public highway, is a public nuisance.²⁵ A public laundry is not a nuisance per se, and cannot be made so by the legislative declaration of a city council.²⁶ But it is held that a live electric wire strung so close to an elevated railroad stairway as to menace the safety of one who inadvertently throws his arm over the rail is a nuisance.²⁷

1 *Middlestadt v. Waupaca etc. Potato Co.*, 93 Wis. 4; *Janesville v. Carpenter*, 77 Wis. 288, 20 Am. St. Rep. 123; *Price v. Creamery Co.*, 87 Wis. 536; *Stadler v. Grieben*, 61 Wis. 500; *McCann v. Strang*, 97 Wis. 551; and see *Davis v. Sawyer*, 133 Mass. 280, 43 Am. Rep. 519; *Appeal of Pennsylvania Lead Co.*, 96 Pa. St. 116, 42 Am. Rep. 534; *Whitney v. Bartholomew*, 21 Conn. 213; *Romer v. Railway Co.*, 75 Minn. 211, 74 Am. St. Rep. 455.

2 *McCann v. Strang*, 97 Wis. 551.

3 *Commonwealth v. King*, 13 Met. 115; *Stoughton v. Porter*, 13 Allen, 191; *Commonwealth v. M'Donald*, 16 Serg. & R. 390.

4 *Commonwealth v. Blaisdell*, 107 Mass. 234.

5 *Grandana v. Lovdal*, 70 Cal. 161; *Wood on Nuisances*, sec. 112.

6 *Hickey v. Railroad Co.*, 96 Mich. 498, 35 Am. St. Rep. 621. Compare *Countryman v. Lighthill*, 24 Hun, 405.

7 *Johnson Chair Co. v. Agresto*, 73 Ill. App. 384.

8 *Callanan v. Gilman*, 107 N. Y. 360, 1 Am. St. Rep. 831; and see *Welsh v. Wilson*, 101 N. Y. 254, 54 Am. Rep. 698; *Mathews v. Kelsey*, 58 Me. 56, 4 Am. Rep. 248.

9 *Chapman v. Boardman*, 60 Conn. 93. As to high fences, see sec. 569, ante.

10 *State v. Moore*, 31 Conn. 479, 83 Am. Dec. 159; and see *Pott v. Wilkes*, 3 Barn. & Ald. 304; *Norristown v. Moyer*, 67 Pa. St. 355, 367.

11 *Bostock v. Railway Co.*, 5 De Gex & S. 584; *Rex v. Carlisle*, 6 Car. & P. 628; *Walker v. Brewster*, L. R. 5 Eq. 25.

12 *Des Plaines v. Poyer*, 123 Ill. 348, 5 Am. St. Rep. 524; and see *State v. Hughes*, 72 N. C. 25.

13 See *Metropolitan Sav. Bank v. Manion*, 87 Md. 68; *Rounsaville v. Kohlheim*, 68 Ga. 668, 45 Am. Rep. 505; *Fort Worth v. Crawford*, 74 Tex. 404, 15 Am. St. Rep. 840; *Aldrich v. Howard*, 8 R. I. 246; *McDonald v. Mayor etc.*, 42 N. J. Eq. 136; *Rodenhausen v. Craven*, 141 Pa. St. 546, 23 Am. St. Rep. 306; and see sec. 563, ante.

14 *Kaspar v. Dawson*, 71 Conn. 405; and see *Norcross v. Thoms*, 51 Me. 503, 81 Am. Dec. 588; *Brown v. Perkins*, 12 Gray, 97.

15 *Barnes v. Hathorn*, 54 Me. 124. See *Los Angeles Co. v. Hollywood etc. Assn.*, 124 Cal. 344, 71 Am. St. Rep. 75, and note.

16 *Baltimore v. Improvement Co.*, 87 Md. 352, 67 Am. St. Rep. 344.

17 *Baltimore v. Improvement Co.*, 87 Md. 352, 67 Am. St. Rep. 344. See secs. 562, 563, ante.

18 *People v. Police Board*, 15 Abb. Pr. 167; *Brill v. Flagler*, 23 Wend. 354; *Quilty v. Battie*, 135 N. Y. 201; *Brown v. Hoburger*, 52 Barb. 15; *Chapman v. Decrow*, 93 Me. 378, 74 Am. St. Rep. 357; *Kinney v. Koopman*, 116 Ala. 310, 67 Am. St. Rep. 119, 122; *Hubbard v. Preston*, 90 Mich. 221, 30 Am. St. Rep. 426. Compare *Wolf v. Chalker*, 31 Conn. 121, 81 Am. Dec. 175; *Bowers v. Horen*, 93 Mich. 420, 32 Am. St. Rep. 513.

19 *State v. Rankin*, 3 S. C. 438, 16 Am. Rep. 737.

20 *Roberts v. Harrison*, 101 Ga. 773, 65 Am. St. Rep. 342; and see, to same effect, *Brimberry v. Railway Co.*, 78 Ga. 641; *Mohr v. Gault*, 10 Wis. 513, 78 Am. Dec. 687; *Gates v. Aratkir*, 24 Q. B. 656; sec. 569, ante.

21 *Kuzniak v. Kozminski*, 107 Mich. 444, 61 Am. St. Rep. 344. See, also, *Phelps v. Nowlen*, 72 N. Y. 39, 28 Am. Rep. 93; *Chenango Bridge Co. v. Paige*, 83 N. Y. 178, 38 Am. Rep. 407.

22 *Flaherty v. Moran*, 81 Mich. 52, 21 Am. St. Rep. 510. See sec. 415, ante.

23 *Grady v. Wolsner*, 46 Ala. 381, 7 Am. Rep. 593.

24 *Pittsburg v. Epping-Carpenter Co.*, 194 Pa. St. 318.

25 *Pittsburg etc. Ry. Co. v. Hood*, 94 Fed. Rep. 618; 36 C. C. A. 423.

26 *In re Hong Wah*, 82 Fed. Rep. 623.

27 *Wittleder v. Illuminating Co.*, 50 N. Y. App. Div. 478.

§ 570. Remedy by Abatement.

The abatement of a nuisance without first resorting to judicial proceedings existed at the common law.¹ And it has sometimes been said that any person may abate a public nuisance. The opinion best sustained by authority is, however, that a public nuisance can only be abated by an individual where it obstructs his private right, or interferes at the time with his enjoyment of a right common to many, as the right of passage upon the public highway and the like, and he thereby sustains a special injury.² And the authorities all agree that, where the right of abatement by private act does exist, it must go no further than to remove that which works the nuisance, doing injury no further than is necessary to accomplish that end.³ So he who undertakes to abate a nuisance runs the risk of

being a trespasser, unless the existence of the nuisance is established.⁴ If he errs in judgment, he is answerable in damages, and if a breach of the peace is involved, he is liable to indictment therefor.⁵ It is within the power of the legislature to destroy property in order to abate a nuisance.⁶ And such destruction of property for the public safety or health is not a taking of private property for public use, without compensation or due process of law, in the sense of the constitution.⁷ But while the legislature may authorize the removal or abatement of a public nuisance by executive officers, and such destruction of the property used in maintaining such nuisances as may be requisite for their abatement, it cannot go further, and decree the destruction of property so used as a punishment of wrong, nor even to prevent the further illegal use of it, where the property is not a nuisance per se.⁸ The reason is, that due process of law requires a hearing and trial before punishment, or before forfeiture of property can be adjudged for the owner's misconduct. Such legislation would be a usurpation by the legislature of judicial powers, and under guise of exercising the power of summary abatement of nuisances, the legislature cannot take into its own hands the enforcement of the criminal or quasi criminal law.⁹ And power conferred on a municipal body

to abate nuisances in any manner it may deem expedient is not to be construed as an unrestricted power, but such means only are intended as are necessary for the public good. The abatement must be limited by its necessity, and no wanton or unnecessary injury to the property or rights of individuals can be permitted.¹⁰ Where an erection or structure itself constitutes the nuisance, as where it is put up in a public street, its demolition or removal becomes necessary to the abatement of the nuisance, but where the offense consists in a wrongful use of a building, harmless in itself, the remedy is to stop such use and not to tear down or remove the building itself.¹¹ But when an unoccupied house or tenement becomes an unquestionable common or public nuisance, the nuisance may be abated by the demolition or removal of the structure.¹² So, generally, if the location of buildings is what constitutes the nuisance, they must be removed or destroyed in order to abate the nuisance, but this will not justify a riotous mob in burning and destroying them.¹³ It may be observed in this connection that, in equity, the abatement of a nuisance is accomplished by an injunction, adapted to the facts of the particular case.¹⁴

1 See *Gunter v. Geary*, 1 Cal. 462; *State v. Flanagan*, 67 Ind. 140; *First Nat. Bank v. Sarlls*, 129 Ind. 201, 28 Am. St. Rep. 185; *Manhattan etc. Co. v. Van Keuren*, 23 N. J. Eq. 251.

2 *Brown v. Perkins*, 12 Gray, 89; *Fort Plain Bridge Co. v. Smith*, 30 N. Y. 44; *Lawton v. Steele*, 119 N. Y. 226, 16 Am. St. Rep. 813; *Brown v. De Groff*, 50 N. J. L. 409, 7 Am. St. Rep. 794; *Cosby v. Railroad Co.*, 10 Bush, 288; *State v. Keeran*, 5 R. I. 497; *Mayor etc. v. Brooke*, 7 Ad. & E. 339; *Dimes v. Petley*, 15 Ad. & E. 276; *Morris v. Nugent*, 7 Car. & P. 572. Compare *Hickey v. Railroad Co.*, 96 Mich. 498, 35 Am. St. Rep. 621, and note.

3 *Heath v. Williams*, 25 Me. 209, 43 Am. Dec. 265; *Hicks v. Dorn*, 42 N. Y. 47; *Hickey v. Railroad Co.*, 96 Mich. 498, 35 Am. St. Rep. 621; *State v. Moffett*, 1 G. Greene, 247; *Watts v. Railway Co.*, 39 W. Va. 196, 45 Am. St. Rep. 894.

4 *Graves v. Shattuck*, 35 N. H. 257, 69 Am. Dec. 536; *Tissot v. Great Southern etc. Co.*, 39 La. Ann. 996, 4 Am. St. Rep. 248.

5 *Crossland v. Pottsville Borough*, 126 Pa. St. 511, 12 Am. St. Rep. 891; and see *Day v. Day*, 4 Md. 262.

6 *Theilan v. Porter*, 14 Lea, 622, 52 Am. Rep. 173; *State v. Yopp*, 97 N. C. 477, 2 Am. St. Rep. 305; *Deems v. Mayor etc.*, 80 Md. 174, 45 Am. St. Rep. 339; *Mugler v. Kansas*, 123 U. S. 623.

7 *Manhattan etc. Co. v. Van Keuren*, 23 N. J. Eq. 251. See *Janesville v. Carpenter*, 77 Wis. 288, 20 Am. St. Rep. 123.

8 *Lawton v. Steele*, 119 N. Y. 226, 16 Am. St. Rep. 813.

9 *Lawton v. Steele*, 119 N. Y. 226, 16 Am. St. Rep. 813; *Brown v. Perkins*, 12 Gray, 89.

10 *Babcock v. Buffalo*, 56 N. Y. 268, affirming 1 Sheld. 317. See *Sprigg v. Garrett Park*, 89 Md. 406; *Baumgartner v. Hasty*, 100 Ind. 575, 50 Am. Rep. 830; *Weil v. Ricord*, 24 N. J. Eq. 169.

11 *Barclay v. Commonwealth*, 25 Pa. St. 503, 64 Am. Dec. 715; *Brightman v. Bristol*, 65 Me. 426, 20 Am. Rep. 711; *Bristol Door etc. Co. v. Bristol*, 97 Va. 304, 75 Am. St. Rep. 783; and see *Moody v. Supervisors*, 46 Barb. 659; *Perry v. Fitzhowe*, 8 Ad. & E., N. S., 757.

12 *Harvey v. Dewoody*, 18 Ark. 252.

13 *Brightman v. Bristol*, 65 Me. 426, 20 Am. Rep. 711; and see *Coker v. Birge*, 10 Ga. 336; *State v. Paul*,

5 R. I. 185; *Allen v. State*, 34 Tex. 230; *Norcross v. Thoms*, 51 Me. 503, 81 Am. Dec. 588.

14 *Sullivan v. Royer*, 72 Cal. 248, 1 Am. St. Rep. 51. See sec. 588, post.

§ 571. Remedy by Indictment.

The remedy for a common or public nuisance is ordinarily by indictment for the punishment of the offender, wherein, on judgment of conviction, the removal or destruction of the thing constituting the nuisance, if physical and tangible, may be adjudged.¹ And this common-law remedy by indictment is held not to be superseded by the statutory remedies provided for cases of public nuisance.² A nuisance, to be indictable, must be the natural and direct effect of the act of the party charged with maintaining it.³ Generally, if the indictment charges the offense in the language of the statute, it will be sufficient. When a thing is not a nuisance in itself, but becomes so by its special circumstances, this must be alleged.⁴ When a corporation is indicted for a nuisance maintained by it, the indictment need only set forth the facts constituting the nuisance.⁵ An indictment for erecting and using a stationary engine without license must allege the use of the engine without license at a specified time and place.⁶ If the indictment is of a particular building or structure, which is sought to be removed or abated, its locality must be particularly set out, and so where the locality be-

comes a part of the description of the offense.⁷ Generally, the venue only need be stated.⁸ The location of the nuisance, if set out, must be substantially proved as alleged.⁹ An allegation of an unlawful or criminal intent is unnecessary if the act charged is expressly forbidden by statute and the language of the statute is followed.¹⁰ The indictment need not show that the nuisance was continued up to or existed at the time of the finding. If the act was committed about the time laid and within the statutory period of limitation, it is sufficient.¹¹ The rule that there can be no joinder of separate and distinct offenses in one and the same count, and that such pleading is bad for duplicity, applies.¹² Thus, the two offenses of creating and maintaining a nuisance are distinct and separate, and cannot be joined in the same count of an indictment or information.¹³ But an indictment cannot be said to contain two offenses in one count which alleges a nuisance and describes the place of its existence.¹⁴ Where two separate and distinct departments of a municipal corporation are charged with separate duties in the government of the corporation, the officers of the two departments cannot be joined in one indictment charging a breach of public duty.¹⁵ And where the officers of such corporation are indicted for maintaining a nuisance resulting from a breach of public duty,

the indictment should state with what duty they are charged, and their failure to perform it.¹⁶ Judgment of conviction of nuisance must be adapted to the nature of the nuisance, and must not be inconsistent with the legal rights of the party convicted.¹⁷ In addition to fine and imprisonment for commission of a nuisance, the court may abate it by an order of prohibition, operating directly upon the person found guilty of maintaining or continuing it, the violation of which will subject him to the coercive process of fine and imprisonment. But it is held that the court has no power to direct the commitment of the offender until the order is obeyed.¹⁸ It has been said that the principal object of an indictment for a nuisance is to compel its abatement, and that, regularly, a part of the judgment upon conviction is that the nuisance be abated.¹⁹ By statute, the matter is, however, usually left to the discretion of the court.²⁰ The most accessible and consistent legal means of abatement must be adopted.²¹ But it is held that the fact that the nuisance is on the land of a stranger is no reason for not abating it.²² The owner of the soil where the nuisance is must not be allowed to control the public right to have it abated, and what the law commands to be done for the benefit of the public, an individual may not resist.²³

1. *Lawton v. Steele*, 119 N. Y. 226, 16 Am. St. Rep. 813; *Bollinger v. Commonwealth*, 98 Ky. 574; *State v. Railway Co.*, 23 N. J. L. 360; *Delaware etc. Canal Co. v. Commonwealth*, 60 Pa. St. 367, 100 Am. Dec. 570; *Wellborn v. Davies*, 40 Ark. 83; *Taylor v. Commonwealth*, 29 Gratt. 780.

2 *State v. Wilson*, 43 N. H. 415; *Commonwealth v. Chemical Works*, 16 Gray, 231.

3 *Gay v. State*, 90 Tenn. 645, 25 Am. St. Rep. 707.

4 *Seacord v. People*, 121 Ill. 623; *State v. Mott*, 61 Md. 297.

5 *Delaware etc. Canal Co. v. Commonwealth*, 60 Pa. St. 367, 100 Am. Dec. 570. Sufficiency of indictment for obstructing highway: See *Palatka etc. Ry. Co. v. State*, 23 Fla. 546, 11 Am. St. Rep. 395; *Patton v. State*, 50 Ark. 53.

6 *State v. Davis*, 80 Me. 488.

7 *Seacord v. People*, 121 Ill. 623. See *Delaware etc. Canal Co. v. Commonwealth*, 60 Pa. St. 367, 100 Am. Dec. 570.

8 *Seacord v. People*, 121 Ill. 623; and see *State v. Kreig*, 13 Iowa, 462; *State v. Schilling*, 14 Iowa, 455.

9 *Droueberger v. State*, 112 Ind. 105; *Mergentheim v. State*, 107 Ind. 567; *Dennis v. State*, 91 Ind. 291.

10 *Commonwealth v. Shea*, 150 Mass. 314; *Commonwealth v. Farren*, 9 Allen, 489; *State v. Railroad Co.*, 120 Ind. 298; *Taylor v. People*, 6 Park. 347.

11 *State v. Schilling*, 14 Iowa, 455.

12 See *State v. Smith*, 61 Me. 386; *Knopf v. State*, 84 Ind. 316; *Chute v. State*, 19 Minn. 271.

13 *Burke v. State*, 23 Ill. App. 36; *Hoodley v. State*, 23 Ill. App. 39; and see *State v. Conner*, 30 Ohio St. 405; *Commonwealth v. Chemical Works*, 16 Gray, 231.

14 *State v. Payson*, 37 Me. 361.

15 *State v. Hall*, 97 N. C. 474.

16 *State v. Hall*, 97 N. C. 474; *State v. Fishplate*, 83 N. C. 654.

17 *Palatka etc. R. R. Co. v. State*, 23 Fla. 546, 11 Am. St. Rep. 395.

18 *Bollinger v. Commonwealth*, 98 Ky. 574. Compare *Taggart v. Commonwealth*, 21 Pa. St. 527.

19 *State v. Railway Co.*, 23 N. J. L. 360.

20 See *Howard v. State*, 6 Ind. 444; *Shepard v. People*, 40 Mich. 487.

21 *Palatka etc. R. R. Co. v. State*, 23 Fla. 546, 11 Am. St. Rep. 395.

22 *Delaware etc. Canal Co. v. Commonwealth*, 60 Pa. St. 367, 100 Am. Dec. 570.

23 *Delaware etc. Canal Co. v. Commonwealth*, 60 Pa. St. 367, 100 Am. Dec. 570; *Smith v. Elliott*, 9 Pa. St. 345.

§ 572. Remedy by Action, Generally.

It is well settled that for injuries arising from a nuisance the injured party may have an action. And the ordinary remedy for a private nuisance at common law was an action on the case.¹ So any person specially injured by the existence of a public nuisance could maintain a special action on the case to recover damages for the loss by him sustained.² And that a private person may maintain an action for a public nuisance, if it is specially injurious to himself, is now established law.³ Some nuisances are at the same time both private and public, in the commission of which both public and private rights are violated. In such cases the offense against the public at large may be punished by indictment, and redress for the special injury may be sought by suit.⁴ When the wrongful act is of itself a disturbance or obstruction only to the exercise of a common and public right, the sole remedy is by public prosecution, unless

special damage is caused to individuals. But when the alleged nuisance would constitute a private wrong by injuring property or health, or creating personal inconvenience and annoyance, for which an action might be maintained in favor of a person injured, it is none the less actionable because the wrong is committed in a manner and under circumstances which would render the guilty party liable to indictment for a common nuisance.⁵ And the person injured may maintain the action, although the private rights of an indefinite number of other persons may be infringed and injured in the same way by the same nuisance.⁶ Thus, it was held that although the offensive odor from a tannery injured a large number of dwellings, yet the plaintiff, whose dwelling was made uncomfortable and almost uninhabitable, was entitled to sue for her particular injury.⁷ So the right of an individual to complain of special injury suffered by him in consequence of a public nuisance authorized by the legislature is not generally impaired by a general grant of power. The legislature cannot be presumed, from a general grant of authority, to have intended to sanction or legalize any acts or any use of property that will create a private nuisance which would injuriously affect the property of another.⁸ Whether an alleged injury to an individual caused by a common nuisance, is or

is not of a kind that gives him a private action to recover damages therefor, is often difficult of determination. But the doctrine well sustained by authority is, that, in order to maintain such action, the plaintiff must show that the damage suffered by him differs from that suffered by the general public, in kind as well as in degree.⁹ But an action will lie for peculiar damages of a different kind from those sustained by the general public, though even in the smallest degree.¹⁰ The obstruction of a public highway is an act which in law amounts to a public nuisance, and one who sustains a private and peculiar injury from such an act may maintain an action to abate the nuisance and to recover the special damages by him sustained.¹¹ But when the damage or injury is common to the public and special to no one, then redress must be obtained by some proceeding in behalf of the public and not by a private action.¹² If, however, the injury be substantial, the fact that other persons have also been injured by the act is no ground for a denial of the relief sought.¹³ Fears, however reasonable, that a thing will become a nuisance, public or private, do not constitute an actionable nuisance, or one which may be abated.¹⁴

1 See *Harvey v. Dewoody*, 18 Ark. 252; *Shaw v. Cummiskey*, 7 Pick. 76; *Hughes v. Mung*, 3 Har. & McH. 441.

2 *Brown v. Watson*, 47 Me. 161, 74 Am. Dec. 482; *Dudley v. Kennedy*, 63 Me. 465.

3 See *Fogg v. Railroad Co.*, 20 Nev. 435; *Redway v. Moore*, 2 Idaho, 1043; *Clark v. Peckham*, 10 R. I. 35, 14 Am. Rep. 654; *Atwood v. Partree*, 56 Conn. 80; *Grisby v. Water Co.*, 40 Cal. 396; *Gardner v. Stroeever*, 89 Cal. 26; *Hargro v. Hodgdon*, 89 Cal. 623; *Nolan v. New Britain*, 69 Conn. 668; *Patterson v. Railroad Co.*, 56 Mich. 172; *Ison v. Manley*, 76 Ga. 804; Cal. Civ. Code, sec. 3480.

4 *Higbee v. Railroad Co.*, 19 N. J. Eq. 276; *McDonald v. Newark*, 42 N. J. Eq. 136; *Gavigan v. Refining Co.*, 186 Pa. St. 604; *Park v. Railway Co.*, 43 Iowa, 636; *Platt v. Railway Co.*, 74 Iowa, 127.

5 *Bigelow, C. J.*, in *Wesson v. Iron Co.*, 13 Allen, 95, 90 Am. Dec. 181; and so, to same effect, *Stetson v. Faxen*, 19 Pick. 147, 31 Am. Dec. 123; *Lind v. San Luis Obispo*, 109 Cal. 340.

6 *Lind v. San Luis Obispo*, 109 Cal. 340; *Francis v. Schoellkopf*, 53 N. Y. 152; *Lansing v. Smith*, 4 Wend. 10, 21 Am. Dec. 89; *Wylie v. Elwood*, 134 Ill. 281, 23 Am. St. Rep. 673.

7 *Francis v. Schoellkopf*, 53 N. Y. 152.

8 *Baltimore v. Improvement Co.*, 87 Md. 352, 67 Am. St. Rep. 344. See sec. 565, ante.

9 *Thayer v. Boston*, 19 Pick. 514, 31 Am. Dec. 157; *Clark v. Railway Co.*, 70 Wis. 593, 5 Am. St. Rep. 187; *Zettel v. West Bend*, 79 Wis. 316, 24 Am. St. Rep. 715; *Fossion v. Landry*, 123 Ind. 136; *San Jose Ranch Co. v. Brooks*, 74 Cal. 465; *Shaubut v. Railroad Co.*, 21 Minn. 504; *Houck v. Wachter*, 34 Md. 272, 6 Am. Rep. 332; *Fogg v. Railway Co.*, 20 Nev. 429; *Redway v. Moore*, 2 Idaho, 1036; *Ison v. Manley*, 76 Ga. 804. Compare *Jermyn v. Scranton*, 186 Pa. St. 595; *Ryan v. Schwartz*, 94 Wis. 403; *Platt v. Railroad Co.*, 74 Iowa, 127.

10 *Chicago v. Building Assn.*, 102 Ill. 379, 40 Am. Rep. 598; *Callanan v. Gilman*, 107 N. Y. 360, 1 Am. St. Rep. 831.

11 *Wakeman v. Wilbur*, 147 N. Y. 657; and see *Davis v. Mayor etc.*, 14 N. Y. 506, 67 Am. Dec. 186; *Adams v. Popham*, 76 N. Y. 410; *Chipman v. Palmer*,

77 N. Y. 51, 33 Am. Rep. 566; *Wheeler v. Bedford*, 54 Conn. 244; *Nolan v. New Britain*, 69 Conn. 668.

12 *Wakeman v. Wilbur*, 147 N. Y. 657; *Callanan v. Gilman*, 107 N. Y. 360, 370, 1 Am. St. Rep. 831; *Blanc v. Klumpke*, 29 Cal. 156.

13 *Wakeman v. Wilbur*, 147 N. Y. 657; *Fogg v. Railway Co.*, 20 Nev. 429.

14 *Gates v. Blincoe*, 2 Dana, 158, 26 Am. Dec. 440.

§ 573. Same—Jurisdiction, Venue, etc.

Where a statute has declared that certain acts constitute a nuisance, and that any person intentionally doing them shall be deemed guilty of a misdemeanor, the common law, if an individual is injured, will supply a civil remedy, though the statute has given none.¹ The remedy by action for a nuisance must generally be sought in courts of general jurisdiction. But jurisdiction in cases of nuisance is sometimes conferred by statute or constitutional provision upon inferior courts or tribunals.² It was held in early Ohio cases that a justice of the peace had no jurisdiction in actions for nuisance upon lands.³ But justices of the peace now have power to abate nuisances under the Ohio statute.⁴ And so under the Georgia statute.⁵ In a suit brought in a federal court to abate a nuisance, it was ruled that the want of a sufficient amount of damages suffered by the plaintiff to give the court jurisdiction would not defeat the remedy if the value of the object to be attained—namely, the removal of the nuisance—was up to the jurisdictional sum.⁶

And this ruling has been approved and applied in numerous cases.⁷ In most instances the subject of a nuisance has a situs and is in some way or manner connected with, or attached to, the realty, and is capable of a local description. And by the common law an action for a nuisance is regarded as local in its nature, and the venue is required to be laid in the county where the nuisance is situated. Such is the general prevailing rule unchanged by statute.⁸ It has been held, however, that where an injury has been caused by an act done in one county to land situated in another, the venue may be laid in either.⁹ And it was held that an action for damages caused by a nuisance was maintainable in New York, where the injury was sustained, although the business which constituted the nuisance was carried on upon lands situated in New Jersey.¹⁰

1 Columbus etc. Iron Co. v. Tucker, 48 Ohio St. 41, 29 Am. St. Rep. 528; and see Cardington v. Fredericks, 46 Ohio St. 442.

2 See Fitzgerald v. Urton, 4 Cal. 235; Learned v. Castle, 67 Cal. 41; Cromwell v. Lowe, 14 Ind. 234.

3 Nichol v. Patterson, 4 Ohio, 200; Harrington v. Heath, 15 Ohio, 483, overruling Maeller v. Flowers, 7 Ohio, pt. 2, 230.

4 Trustees etc. v. Tuttle, 30 Ohio St. 62.

5 See Wetter v. Campbell, 60 Ga. 266; Holmes v. Jones, 80 Ga. 659.

6 Mississippi etc. R. R. Co. v. Ward, 2 Black, 485; and so, to same effect, Market Co. v. Hoffman, 101 U. S. 112.

7 See *Whitman v. Hubbell*, 24 Blackf. 240; 30 Fed. Rep. 81; *Rainey v. Herbert*, 54 Fed. Rep. 248; 55 Fed. Rep. 443; 3 U. S. App. 592; *Smith v. Bivens*, 56 Fed. Rep. 354; *Western Union Tel. Co. v. Charleston*, 56 Fed. Rep. 419, 420.

8 See *Deason v. Shreve*, 23 N. J. L. 204; *Gilbert v. Water etc. Co.*, 19 Iowa, 323; *Buck v. Ellenbolt*, 84 Iowa, 397; *In re Eldred*, 46 Wis. 550; *Vermont etc. R. R. v. Orcutt*, 16 Gray, 116; *Watts v. Kinney*, 23 Wend. 485; *Oliphant v. Smith*, 3 Penr. & W. 180; *Horne v. Buffalo*, 49 Hun, 76; *Foot v. Edwards*, 3 Blatchf. 310; *Mississippi etc. Ry. Co. v. Ward*, 2 Black, 485; *Queen v. Cotton*, 1 El. & E. 202; *Richardson v. Locklin*, 6 Best & S. 777.

9 *Pilgrim v. Mollor*, 1 Ill. App. 448; *Ohio etc. Ry. Co. v. Combs*, 43 Ill. App. 119; and see *Thayer v. Brooks*, 17 Ohio, 489, 49 Am. Dec. 474; *Barden v. Crocker*, 10 Pick. 383; *Thompson v. Crocker*, 9 Pick. 59.

10 *Ruckman v. Green*, 9 Hun, 225; and so, to same effect, *Thayer v. Brooks*, 17 Ohio, 489, 49 Am. Dec. 474.

§ 574. Same—Notice to Abate.

When a nuisance has been created by the defendant himself, and not by the former owner of the property, notice to him to abate it is unnecessary before bringing suit.¹ And it has been held that an action at law for a private nuisance may be maintained against a person who actively maintains a nuisance originally erected by another, although the defendant has never been notified to abate the nuisance.² But, as a general rule, before an action can be maintained against a party who has not created the nuisance, it must be established that he either failed, after request, to remove it, or has done

some act to continue it. There must have been some active participation in the continuance of the nuisance, or some positive act evidencing its adoption.³

1 *Metropolitan Sav. Bank v. Manion*, 87 Md. 68; and see *Southern Ry. Co. v. Cook*, 106 Ga. 450, 453.

2 *Whitemack v. Philadelphia etc. R. R. Co.*, 57 Fed. Rep. 901. Compare *Brown v. Railroad Co.*, 12 N. Y. 486; *Wenzlick v. McCotter*, 87 N. Y. 122, 41 Am. Rep. 358.

3 *Walter v. County Commissioners*, 35 Md. 385; *Noyes v. Stillman*, 24 Conn. 15; *Southern Ry. Co. v. Cook*, 106 Ga. 450; *Occum Co. v. Sprague Mfg. Co.*, 34 Conn. 529; *Castle v. Smith* (Sup. Ct., Cal.), 36 Pac. Rep. 859; *Philadelphia etc. R. R. Co. v. Smith*, 64 Fed. Rep. 679; 12 C. C. A. 384.

§ 575. Who May Sue.

An action to recover for injuries arising out of a nuisance can, in general, only be maintained by one who is an owner or has some legal interest, as lessee or otherwise, in the land which is affected by the nuisance. And where both the occupation and possession of the premises affected were in a legal sense that of the wife and not of the husband, it was held that he could not maintain the action, although he lived in the house with his wife and supported the family.¹ The grantee of land affected by a nuisance not ripened into an easement may, notwithstanding he purchased with notice, maintain an action to abate such nuisance and for damages resulting from its continuance, since, if the grantor could maintain

such an action, his grantee could.² No one has a right to discharge surface water from his own land, through an artificial channel, so near to the land of another that its natural and inevitable tendency is to encroach upon it through causes easy to foresee and guard against. And where a railroad company dug a ditch on its right of way for the drainage of surface water so near to the line of a town street as to encroach upon the street by the erosion of the soil of its banks, it was held that an injured abutting lot owner on the opposite side of the street could maintain an action for the abatement of the ditch as a private nuisance and for damages caused by it.³ So it was adjudged that the owner of a slaughterhouse situated on a public highway, whose business was interrupted and injured by an obstruction of the highway, was entitled to maintain an action for damages and to an injunction against the maintenance of the nuisance.⁴ In an action to recover damages for a nuisance to the lands of tenants in common they should be joined as plaintiffs, but the objection that they are not so joined can only be raised by a plea in abatement in that action.⁵ Several individuals specially injured in the enjoyment of their homes by the existence of a public nuisance may join in an action for the abatement of the nuisance, notwithstanding they severally own the property on which they reside.⁶ But in such cases the relief granted must

be such as is common to all of the plaintiffs, and several judgments in favor of each for his separate damages cannot be rendered.⁷ It is held to be a misjoinder of parties for a father to join with him as plaintiffs his minor children in a suit for damages for a nuisance whereby such children were rendered sick.⁸ Although a pond from which noxious vapors are emitted, causing sickness to the plaintiff, is situated on his own premises, he may nevertheless maintain an action for the damages thus sustained against the neighboring landowners, whose wrongful act in obstructing the natural flow of surface water across his premises had created the pond.⁹ In some jurisdictions the proper party plaintiff in an action to abate a nuisance is determined by statute. In New York, an action, both equitable and legal in its character, may be maintained by the people, through the attorney general, for the removal of an alleged nuisance, for an injunction restraining its continuance, and for damages.¹⁰ In California, an action to remove and abate a public nuisance caused by an obstruction upon a public highway is properly brought in the name of the road commissioner.¹¹ Under the Iowa statute (Act of 1884), an action to abate as a nuisance a place where intoxicating liquors are unlawfully sold is one for the public benefit, and can be maintained only by a citizen of the county where the alleged nuisance exists.¹²

1 Kavanagh v. Barber, 131 N. Y. 211. See, also, Ellis v. Railroad Co., 63 Mo. 131, 21 Am. Rep. 436; Garland v. Aurin, 103 Tenn. 555, 562, 76 Am. St. Rep. 699.

2 Townes v. City Council etc., 52 S. C. 396.

3 Reinhart etc. v. Sutton, 58 Kan. 726; and see Ryan v. Schwartz, 94 Wis. 403.

4 Gardner v. Stroever, 89 Cal. 26; and see Hargro v. Hodgdon, 89 Cal. 623; Lind v. San Luis Obispo, 109 Cal. 340; Smith v. Mitchell, 21 Wash. 536, 75 Am. St. Rep. 858.

5 Fell v. Bennett, 110 Pa. St. 181.

6 Bushnell v. Robeson, 62 Iowa, 540; Grant v. Schmidt, 22 Minn. 1.

7 Grant v. Schmidt, 22 Minn. 1; and see Hellams v. Switzer, 24 S. C. 39; Foreman v. Boyle, 88 Cal. 290; and see Blaisdell v. Stephens, 14 Nev. 17, 33 Am. Rep. 523.

8 Lockett v. Fort Worth etc. Ry. Co., 78 Tex. 211.

9 Garland v. Aurin, 103 Tenn. 555, 76 Am. St. Rep. 699.

10 People v. Metropolitan Tel. etc. Co., 11 Abb. N. C. 304; 64 How. Pr. 120; and see People v. Vanderbilt, 26 N. Y. 287. See, also, People v. Beaudry, 91 Cal. 213; People v. Reed, 81 Cal. 70, 15 Am. St. Rep. 22.

11 Hall v. Kauffman, 106 Cal. 451; Bailey v. Dale, 71 Cal. 36; San Benito Co. v. Whitesides, 51 Cal. 416.

12 Applegate v. Winebrenner, 66 Iowa, 67. See Ottumwa v. Chinn, 75 Iowa, 405.

§ 576. Who May be Held Liable.

As a general rule, an owner of land, as such, is not responsible for any nuisance thereon. It is the occupier, and he alone, to whom such responsibility generally and prima facie attaches.¹ But if the owner creates and maintains a nuisance, or if he creates a nuisance, and then de-

mises the land with the nuisance thereon, although he is out of occupation, or if the nuisance was created by the prior owner or by a stranger, and he knowingly maintains it, or if he demises the premises and covenants to keep them in repair, and omits to repair them, and thus they become a nuisance, or if he demises premises to be used as a nuisance or for a business, or in any way so that they will necessarily become a nuisance, he is in all such cases responsible.² Where the predecessor in an easement or estate creates a nuisance, the successor, if he has knowledge of it, will be liable for a continuation of it.³ And this rule applies to a railroad lessee.⁴ But a grantee or devisee of premises upon which there is a nuisance at the time the title passes is not responsible for the nuisance until he has had notice thereof, and in some cases until he has been requested to abate it.⁵ For a nuisance committed by a tenant during his term, the landlord, as a general rule, is not liable, for he has no legal means of abating the nuisance. He cannot interfere with the possession of the tenant for that purpose, but when the term expires he has then the right of entry and power to abate the nuisance, and if he fails to do so his liability commences.⁶ And in cases where the nuisance exists at the time of the creation of the estate for years, and the lessee does nothing except to main-

tain the demised premises in the condition in which he received them, the person who suffers from the nuisance must look to the landlord, and not to the tenant, for redress.⁷ A purchaser of premises with a nuisance thereon maintained by a tenant is not liable for the continuance of the nuisance when it does not appear that he had any control of the tenant or of the use of the premises made by him, and even if the landlord had power to enter and expel the tenant, he is not bound to do so for the benefit of the party injured by the nuisance.⁸ Concert of action and common intent and purpose are generally necessary to make two or more persons joint tortfeasors and jointly liable.⁹ If, however, their acts are separate and distinct as to time and place, but culminate in producing a public nuisance, which injures the person or property of another, they are jointly and severally liable.¹⁰ The general rule is, that anyone who participates in the erection or continuance of a nuisance is responsible.¹¹ It is held that if lands are unlawfully flooded with surface water, as the result of the joint act of several parties, each may be sued for the entire damage. If, however, the damage caused is the combined result of the acts of several, acting independently, each is liable in proportion to his contribution to the nuisance, and not otherwise.¹² Under New York statutes, a

married woman has such control over her own real property that a husband cannot, without her consent and against her will, establish and maintain a nuisance upon it, and if she permits him to do so she is liable for the damages thereby occasioned.¹³

1 *Lowell v. Spaulding*, 4 Cush. 277, 50 Am. Dec. 775; *Kirby v. Boyleston Market Assn.*, 14 Gray, 249, 74 Am. Dec. 682; *East Jersey Water Co. v. Bigelow*, 60 N. J. L. 201, 215; *Pretty v. Bickmore*, L. R. 8 Com. P. 401.

2 *Ahern v. Steele*, 115 N. Y. 203, 12 Am. St. Rep. 778. See, also, *Givens v. Van Studdiford*, 86 Mo. 149, 56 Am. Rep. 421; *Sloggy v. Dilworth*, 38 Minn. 179, 8 Am. St. Rep. 656; *Marsan v. French*, 61 Tex. 173, 48 Am. Rep. 272; *Maeuner v. Carroll*, 46 Md. 216; *Metropolitan Sav. Bank v. Manion*, 87 Md. 68; *Meyer v. Harris*, 61 N. J. L. 83; *East Jersey Water Co. v. Bigelow*, 60 N. J. L. 201; *Timlin v. Standard Oil Co.*, 126 N. Y. 514, 22 Am. St. Rep. 845.

3 *Payne v. Railroad Co.*, 112 Mo. 16; *Townes v. City Council*, 52 S. C. 396; *Pierce v. German etc. Loan Soc.*, 72 Cal. 180, 1 Am. St. Rep. 45.

4 *Hulett v. Missouri etc. R. R. Co.*, 80 Mo. App. 87.

5 *Pierson v. Glean*, 14 N. J. L. 37, 25 Am. Dec. 497; *Lufkin v. Zane*, 157 Mass. 117, 34 Am. St. Rep. 262; *Ahern v. Steele*, 115 N. Y. 203, 12 Am. St. Rep. 778; *Groff v. Ankenbrandt*, 124 Ill. 51, 7 Am. St. Rep. 342; *Slight v. Gutzlaff*, 35 Wis. 675, 17 Am. Rep. 476; *Sloggy v. Dilworth*, 38 Minn. 179, 8 Am. St. Rep. 656. See sec. 574, ante.

6 *Ingwersen v. Rankin*, 47 N. J. L. 18, 54 Am. Rep. 109; *Baker v. Allen*, 66 Ark. 271, 74 Am. St. Rep. 93.

7 *Meyer v. Harris*, 61 N. J. L. 83. Compare *Lufkin v. Zane*, 157 Mass. 117, 34 Am. St. Rep. 262, and note.

8 *Lufkin v. Zane*, 157 Mass. 117, 34 Am. St. Rep. 262.

9 See *Sellick v. Hall*, 47 Conn. 260; *Chipman v. Palmer*, 77 N. Y. 51, 33 Am. Rep. 566; *Gallagher v.*

Kemmerer, 144 Pa. St. 509, 27 Am. St. Rep. 673; Blaisdell v. Stephens, 14 Nev. 17, 33 Am. Rep. 523; People v. Oakland Water Front Co., 118 Cal. 234.

10 Valparaiso v. Moffitt, 12 Ind. App. 250, 54 Am. St. Rep. 522; and see Slater v. Mersereau, 64 N. Y. 138; Berkson v. Kansas etc. Ry. Co., 144 Mo. 211; Comminge v. Stevenson, 76 Tex. 642.

11 See Cohen v. Mayor etc., 113 N. Y. 535, 10 Am. St. Rep. 506; Prussak v. Hutton, 51 N. Y. Supp. 761, 30 N. Y. App. Div. 66; Sullivan v. McManus, 45 N. Y. Supp. 1079; 19 N. Y. App. Div. 167.

12 Sloggy v. Dilworth, 38 Minn. 179, 8 Am. St. Rep. 656; and see Brown v. McAllister, 39 Cal. 573; Chipman v. Palmer, 77 N. Y. 51, 33 Am. Rep. 566; Sellick v. Hall, 47 Conn. 260; Martinowsky v. Hannibal, 35 Mo. App. 70.

13 Quilty v. Battie, 135 N. Y. 201.

§ 577. Liability of Municipal Corporations for.

Municipal corporations are liable for erecting and maintaining a nuisance, the same as natural persons.¹ If a corporation, private or public, creates a nuisance on its own property, or in the exercise of its rights, upon common or public property, it becomes liable to adjoining proprietors who suffer special damage.² And although a nuisance was abated by a city, which created it, the city is still liable for the injury done to property while the nuisance continued.³ A city having control and possession of a dump-yard and burying ground so negligently and carelessly kept as to constitute a nuisance was held liable in damages to an adjoining landowner injured thereby.⁴ But it has been held that a county which owned and maintained, for public purposes,

a penitentiary, almshouse, and farm used therewith, acted in a governmental capacity and was not liable for the acts of the officials controlling them in permitting sewage and night soil from the buildings to be spread over the farm, thereby creating and constituting a nuisance to the damage of the land and stock of a neighboring owner.⁵ This decision is in accord with the general doctrine that two kinds of duties are imposed on municipal corporations—the one governmental, the other quasi private or corporate. In the exercise of the latter duties the municipality is liable for the acts of its officers or agents, while in the former it is not.⁶ It is said in the above case that the proper remedy of the neighboring owner would be to proceed against the board of supervisors and the officers in control of the public buildings, to have a continuance of the nuisance enjoined.⁷ A municipal corporation which plans and constructs a sewer under its chartered power is not responsible for damages resulting from defects in the plan or in the method of construction. In such case the municipality acts judicially or quasi judicially, and having devised a plan for drainage or sewerage, it may be carried into execution with due care, without risk of private action.⁸ But a municipal corporation has no right to collect the sewage of a large portion of a city, and, by artificial chan-

nels, cast it upon the lands of another, and for such acts it is liable in damages whether or not they be in conformity to a plan adopted by its officers, judicial or otherwise.⁹ And a court of equity has jurisdiction to abate a nuisance so caused at the suit of an individual who has sustained special injury therefrom.¹⁰

1 *Haag v. Board etc.*, 60 Ind. 511, 28 Am. Rep. 654; *Valparaiso v. Moffitt*, 12 Ind. App. 250, 54 Am. St. Rep. 522; *Bristol Door etc. Co. v. Bristol*, 97 Va. 304, 75 Am. St. Rep. 783.

2 *Wesson v. Washburn Iron Co.*, 13 Allen, 95, 90 Am. Dec. 181; *Camp v. Barre*, 66 Vt. 563; *Willett v. St. Albans*, 69 Vt. 330; *Briegel v. Philadelphia*, 135 Pa. St. 451, 20 Am. St. Rep. 885; *Chicago etc. Ry. Co. v. First M. E. Church*, 102 Fed. Rep. 85.

3 *New Albany v. Slider*, 21 Ind. App. 392.

4 *Fort Worth v. Crawford*, 74 Tex. 404, 15 Am. St. Rep. 840, and note. See, also, *Nolan v. New Britain*, 69 Conn. 668; *Seifert v. Brooklyn*, 101 N. Y. 136, 54 Am. Rep. 664; *Platt v. Waterbury*, 72 Conn. 531; *Watson v. New Milford*, 72 Conn. 561, 77 Am. St. Rep. 345.

5 *Lefrois v. County of Monroe*, 162 N. Y. 563. See, also, *Long v. Elberton*, 109 Ga. 28, 77 Am. St. Rep. 363; *Bacon v. Walker*, 77 Ga. 338; *Pause v. Atlanta*, 98 Ga. 103.

6 *Maximilian v. Mayor etc.*, 62 N. Y. 160, 20 Am. Rep. 468; *Springfield etc. Ins. Co. v. Keeseville*, 148 N. Y. 46, 51 Am. St. Rep. 667.

7 *Lefrois v. County of Monroe*, 162 N. Y. 563, 568.

8 *Winn v. Rutland*, 52 Vt. 481; *Child v. Boston*, 4 Allen, 41, 81 Am. Dec. 688; *Willett v. St. Albans*, 69 Vt. 330; *Johnston v. District of Columbia*, 118 U. S. 19.

9 *Sleight v. Kingston*, 11 Hun, 594; *Noonan v. Albany*, 79 N. Y. 476, 35 Am. Rep. 540; *Story v. Railway Co.*, 90 N. Y. 122, 43 Am. Rep. 146; *Seifert v. Brooklyn*, 101 N. Y. 136, 54 Am. Rep. 664; *Chapman v. Rochester*, 110 N. Y. 273, 6 Am. St. Rep. 366; *Rice*

v. Evansville, 108 Ind. 7, 58 Am. Rep. 22; Ashley v. Port Huron, 35 Mich. 206, 24 Am. Rep. 552.

10 Carmichael v. Texarkana, 94 Fed. Rep. 561; and see sec. 580, ante.

§ 578. Pleading—Sufficiency of Complaint, Generally.

In a civil action for a nuisance, the complaint must set forth facts which in law constitute a nuisance from which the plaintiff has suffered special injury.¹ The action is said to be a substitute for the statute remedy by writ of assistance, and the plaintiff must substantially aver all that was requisite to sustain an action of that nature.² He must allege the facts constituting a nuisance and show that it was the proximate cause of the damage sustained.³ And under a complaint stating a nuisance of one kind, it is not permissible to prove a nuisance of a character essentially different.⁴ But if the facts alleged in the declaration or complaint of themselves constitute a nuisance, in fact and in law, it is unnecessary further to characterize them by the use of the word "nuisance." To do so would simply be to state a conclusion of law.⁵ A complaint in an action for a nuisance is not, however, rendered insufficient merely because of surplusage therein, provided it contains allegations showing a good cause of action.⁶ In an action for damages for the erection or continuance of a nuisance, it is necessary to allege that the defendant erected

or continues it.⁷ And a complaint or petition in such action which fails to allege that the defendant erected a nuisance or had actual knowledge that he was maintaining it, does not contain a sufficient allegation of facts to entitle the plaintiff to recover damages caused by the nuisance, and a demurrer to the pleading is properly sustained.⁸ It has also been held that if the action is not against the original creator of the nuisance, but against the mere continuer of it, a special request to remove it must be alleged.⁹ In an action for continuing a nuisance, it is not necessary to set forth the time of its erection or creation. But in an action for erecting a nuisance, the fact of the creation on some given time must be clearly charged, though the exact time need not be averred.¹⁰ In an action for maintaining a nuisance, it is unnecessary by direct averment to negative the supposition that the injuries were occasioned by other causes than those constituting the foundation of the suit, where it is necessarily implied from other averments in the complaint or petition that the acts of the defendant were the direct cause of the injuries.¹¹ The common-law action by writ of nuisance was a real action, and it was necessary for the plaintiff to aver in his declaration that he had a freehold estate in the premises affected by the nuisance.¹² But in an action on the case for damages merely, sus-

tained in consequence of the erection of a nuisance, it is enough that the plaintiff is in possession of the premises affected thereby, and that the declaration shows such possession.¹³ The title or interest of the defendant in the land upon which the nuisance is maintained need not be set forth. An allegation that the defendant acted with the consent, by license, lease, or otherwise, of the owner of the land is sufficient to admit proof of the nature of the interest held.¹⁴ So in an action against a city for erecting and maintaining a nuisance it was held to be unnecessary to plead the character of its possession. If the proof shows a maintenance of the nuisance while in the possession and control of the city, its liability attaches, no matter how it obtained possession.¹⁵ But a complaint against a municipal corporation for injuries caused by a nuisance must show that the corporation has such a control over nuisances within its corporate limits as makes the wrong a violation of legal duty, imposed by charter or general law, otherwise there can be no recovery.¹⁶ And it was held that the plaintiff could not recover in an action against the commissioners of a county for injuries resulting from the erection and maintenance of a nuisance, since he did not allege in his complaint that the commissioners had failed to use the means at their disposal to prevent the nuisance.¹⁷ The complaint

in an action for a nuisance need not set out in detail all the particular injuries which result therefrom. It is enough to specify the main fact, but if it is attempted to particularize the resulting injuries all that are designed to be proved should be stated.¹⁸

1 O'Brien v. St. Paul, 18 Minn. 176.

2 Ellsworth v. Putnam, 16 Barb. 565.

3 Jackson v. Castle, 80 Me. 119.

4 O'Brien v. St. Paul, 18 Minn. 176.

5 Sullivan v. Waterman, 20 R. I. 372; Laflin etc. Powder Co. v. Tearney, 131 Ill. 322, 19 Am. St. Rep. 34; Campbell v. United States Foundry Co., 26 N. Y. Supp. 165; 73 Hun, 576.

6 Scheible v. Law, 65 Ind. 332; New Albany v. Armstrong, 22 Ind. App. 15, 18.

7 Beavers v. Trimmer, 25 N. J. L. 97.

8 Missouri Pac. Ry. Co. v. Webster, 3 Kan. App. 106.

9 Beavers v. Trimmer, 25 N. J. L. 97; Slight v. Gutzlaff, 35 Wis. 675, 17 Am. Rep. 476. Compare sec. 574, ante.

10 Hodges v. Hodges, 5 Met. 205.

11 Fort Worth v. Crawford, 74 Tex. 404, 15 Am. St. Rep. 840.

12 Cornes v. Harris, 1 N. Y. 223; Hess v. Railroad Co., 29 Barb. 391.

13 Cornes v. Harris, 1 N. Y. 223; Quinn v. Winter, 15 Daly, 383. See sec. 575, ante.

14 Horton v. Brownsey, 10 N. Y. St. Rep. 800.

15 Fort Worth v. Crawford, 74 Tex. 404, 15 Am. St. Rep. 840.

16 Martinowsky v. Hannibal, 35 Mo. App. 70. See sec. 577, ante.

17 Threadgill v. Commissioners etc., 99 N. C. 352; and see State v. Hall, 97 N. C. 474; State v. Fishplate, 83 N. C. 654.

18 Pinney v. Berry, 61 Mo. 359.

§ 579. Same—Alleging Damages.

In an action for a private nuisance, it need not be alleged that the plaintiff suffered special damages from the acts complained of. Under a general claim for damages, the plaintiff is entitled to recover, as a recompense for the injury sustained, such actual damages as are the natural and necessary consequence of the wrong committed.¹ But if special damages be claimed, they must, as a general rule, be set out in the declaration or complaint. The means by which the damages were caused must be alleged.² And it is held that damages which though the natural, are not the necessary, consequence of the wrongful act of the defendant, must, in order to be recovered, be specially alleged.³

1 *Sullivan v. Waterman*, 20 R. I. 372; *Parker v. Griswold*, 17 Conn. 288, 42 Am. Dec. 739; *Troy v. Railroad Co.*, 23 N. H. 83, 55 Am. Dec. 177; *Smiths v. McConathy*, 11 Mo. 517.

2 *Hart v. Evans*, 8 Pa. St. 13; *Lewiston Turnp. Co. v. Wagon Road Co.*, 41 Cal. 562; *Mallory v. Thomas*, 98 Cal. 644.

3 *Comminge v. Stevenson*, 76 Tex. 642.

§ 580. Same—Private Action for Public Nuisance.

A public nuisance may become a private nuisance by inflicting upon a particular individual some special or peculiar damage.¹ But a private individual cannot maintain an action for a public nuisance unless it be made to appear by proper

averment in his complaint that the plaintiff will suffer therefrom some injury, in its nature special and peculiar to him, and different in kind as well as degree from that to which the public is thereby subjected.² And a complaint for special injury to the plaintiff's property from a public nuisance is held to be fatally defective if it fails to show by proper averments that other and adjacent property owners in the town will not suffer a like injury. If no other inhabitants of the town are so situated as to be injured by the alleged nuisance, the complaint must so allege.³ It has been held that the omission to aver special damages in a private action for a public nuisance is not cured by verdict.⁴ If the complaint in an action to abate a nuisance alleges that the nuisance has subjected the plaintiff to several distinct injuries, the amount of damage caused by each must be averred, otherwise the complaint will be bad for ambiguity and uncertainty.⁵ In an action to abate as a nuisance the accumulation of surface waters alongside a railroad track, the allegations of the complaint are held to be insufficient, unless they show the existence of a nuisance per se—that is, something creating danger, at all times and under all circumstances, to life, health or property.⁶ A complaint in an action to abate a public nuisance which does not by positive averment state a special damage or injury to

the plaintiff different in kind from that sustained by the general public, is insufficient on special demurrer. If, however, the essential fact of such damage or injury appears by plain and necessary implication, and objection is not taken by special demurrer, the complaint will be upheld upon a motion for judgment on the pleadings made at the commencement of the trial.⁷ So it is said that the strictness of the original rule that special damage must be shown, in order to justify a private action for injury growing out of a public nuisance, has been greatly modified since its early announcement.⁸ It has accordingly been held that an individual who receives actual damage from a nuisance may maintain a private suit for his own injury, although there may be many others in the like situation.⁹

1 *New Albany v. Slider*, 21 Ind. App. 392; *New Albany v. Armstrong*, 22 Ind. App. 15. See sec. 570, ante; *Smith v. Mitchell*, 21 Wash. 536, 75 Am. St. Rep. 858.

2 Cal. Civ. Code, sec. 3493; *McCloskey v. Kreling*, 76 Cal. 511; *Gardner v. Stroever*, 89 Cal. 26; *Redway v. Moore*, 2 Idaho, 1036; *South Carolina Steamboat Co. v. Wilmington etc. R. R. Co.*, 46 S. C. 327, 57 Am. St. Rep. 688; *Baltzger v. Carolina etc. Ry. Co.*, 54 S. C. 242, 71 Am. St. Rep. 789; *Walley v. Ditch Co.*, 15 Colo. 579; *Clark v. Chicago etc. R. R. Co.*, 70 Wis. 593, 5 Am. St. Rep. 187; *Lakkie v. Chicago etc. Ry. Co.*, 44 Minn. 438. But compare *Wylie v. Elwood*, 134 Ill. 281, 23 Am. St. Rep. 673.

3 *Siskiyou Lumber etc. Co. v. Rostel*, 121 Cal. 511; and see *Fogg v. Nevada etc. Ry. Co.*, 20 Nev. 429, reviewing the complaint and holding that its averments as to special damage were insufficient.

4 Platte etc. Ditch Co. v. Anderson, 8 Colo. 131. See Kaje v. Chicago etc. Ry. Co., 57 Minn. 422, 47 Am. St. Rep. 627, as to what constitutes special damage not common to the general public.

5 Grandona v. Lovdal, 70 Cal. 161.

6 Baltzeger v. Carolina etc. Ry. Co., 54 S. C. 242, 71 Am. St. Rep. 789.

7 Hargro v. Hodgdon, 89 Cal. 623.

8 Wylie v. Elwood, 134 Ill. 281, 23 Am. St. Rep. 673.

9 Lansing v. Smith, 4 Wend. 10, 21 Am. Dec. 89; Wylie v. Elwood, 134 Ill. 281, 23 Am. St. Rep. 673; Francis v. Schoellkopf, 53 N. Y. 152; and see Smith v. Sedalia, 152 Mo. 283, 301.

§ 581. Same—Allegation of Negligence.

As a general rule, the question of care or want of care is not involved in an action for injuries resulting from a nuisance, and negligence on the part of the defendant need not be alleged.¹ The doctrine maintained by the authorities is, that although the acts complained of are inseparably connected with the carrying on of a business entirely lawful, and the resulting damages are a necessary consequence, yet if those acts constitute a nuisance per se, it is not necessary to show negligence in order to sustain a recovery, and negligence need not be charged.² Although the acts are done by one upon his own land, yet if they necessarily tend to injure his neighbor in his pre-existing rights of property, he is liable in damages for the natural and necessary consequences thereof, irrespective of any considerations as to the care and skill with which he may have con-

ducted such operations.³ If the damage is the necessary consequence of just what the defendant is doing, or is incident to the business itself or the manner in which it is conducted, the law of negligence has no application and the law of nuisance applies.⁴ Negligence may, however, be an indispensable element in the constitution of the nuisance.⁵ Thus, a lawful business, if properly conducted, is not a nuisance per se, but it may be so negligently conducted as to become a nuisance, in which case negligence must be alleged and shown to entitle the plaintiff to a recovery.⁶ As where one places a steam boiler upon his premises and operates it with care and skill, so that it is no nuisance, he is not liable for damages to his neighbor occasioned by the explosion of the boiler, in the absence of proof of fault or negligence on the part of the former.⁷ So if one builds a mill dam upon a proper model, and the work is well and substantially done, he is not liable to an action, though it break away, in consequence of which his neighbor's dam and mill are destroyed. Negligence must be shown to make him liable.⁸ So if a person builds a fire upon his own premises, he cannot be held liable, without proof of negligence, if it escapes upon his neighbor's premises and does him damage.⁹

1 *Laffin etc. Powder Co. v. Tearney*, 131 Ill. 322, 19 Am. St. Rep. 34; *Clifford v. Darn*, 81 N. Y. 52, 56; *Lamming v. Galusha*, 135 N. Y. 239.

2 *Lamming v. Galusha*, 135 N. Y. 239; *Bohan v. Port Jervis Gaslight Co.*, 122 N. Y. 18; *Cogswell v. Railway Co.*, 103 N. Y. 10, 57 Am. Rep. 701; *McAndrews v. Collerd*, 42 N. J. L. 189, 36 Am. Rep. 508; *Tiffin v. McCormack*, 34 Ohio St. 638, 32 Am. Rep. 408.

3 *Cahill v. Eastman*, 18 Minn. 324, 10 Am. Rep. 184; *Heeg v. Licht*, 80 N. Y. 579, 36 Am. Rep. 654; *Colton v. Onderdonk*, 69 Cal. 155, 58 Am. Rep. 556; *Wier's Appeal*, 74 Pa. St. 230, and cases cited above.

4 *Brown, J.*, in *Bohan v. Port Jervis Gaslight Co.*, 122 N. Y. 18, 26; also *Campbell v. United States Foundry Co.*, 73 Hun, 576.

5 See *People v. Sands*, 1 Johns. 78, 3 Am. Dec. 296; *Campbell v. United States Foundry Co.*, 73 Hun, 576; *Simmons v. Everson*, 124 N. Y. 319, 21 Am. St. Rep. 676; *Morris v. Barrisford*, 9 Misc. Rep. 14.

6 *Dunsbach v. Hollister*, 49 Hun, 352.

7 *Losee v. Buchanan*, 51 N. Y. 476, 10 Am. Rep. 623; and see *Wier's Appeal*, 74 Pa. St. 230.

8 *Livingston v. Adams*, 8 Cow. 175; *Todd v. Cochell*, 17 Cal. 97; and see *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. St. 153, 57 Am. Rep. 445; *Moody v. McClelland*, 39 Ala. 45, 84 Am. Dec. 770; *Sheldon v. Sherman*, 42 N. Y. 484, 1 Am. Rep. 569; *Pixley v. Clark*, 35 N. Y. 520, 91 Am. Dec. 72; *Nitroglycerin Case*, 15 Wall. 538.

9 *Clark v. Foot*, 8 Johns. 422; *Tourtellot v. Rosebrook*, 11 Met. 460; *Calkins v. Barger*, 44 Barb. 424; *Bachelor v. Heagan*, 18 Me. 32.

§ 582. Same—Joinder of Causes.

A count for erecting and creating a nuisance and a count for the continuance of such nuisance may be joined in the same writ.¹ Counts for obstructing a private way may be joined with other counts for obstructing a public highway to the plaintiff's damage, but for the latter obstruction it is essential that special damages should be alleged and proved.² A count for entering

and breaking the plaintiff's close may be properly joined with counts for polluting a stream of water, to the use of which in its natural state he is entitled.³ A cause of action for injuries resulting from noxious vapors arising from stagnant water suffered to remain on the owner's premises, in an excavation thereon made by him, may be joined with one for damages arising from the deposit of dirt or rubbish, removed from such excavation, in front of the adjoining premises.⁴ A complaint which seeks to abate an alleged nuisance and to recover damages for injuries caused thereby is not demurrable for misjoinder of causes of action.⁵ A cause of action for damages arising from injuries to the plaintiff's land occasioned by the overflowing of the same with water caused by the wrongful construction and use of a mill dam may be united with a cause of action to abate the mill dam, or to perpetually enjoin its use, so far as such use is wrongful and a nuisance.⁶ A cause of action under the California statute (Political Code, section 2734, as amended in 1883) to abate a nuisance caused by the obstruction of a public highway, and a cause of action to recover the penalty fixed for every day the nuisance remained after notice to remove it, may be united in the same action.⁷ In an action for damages resulting from the maintenance of a nuisance, a claim for additional damages accru-

ing since the commencement of the action from a continuance of the same nuisance may be set up by supplemental complaint or petition.⁸

1 *Hodges v. Hodges*, 5 Met. 205; *Miller v. Frazier*, 3 Watts, 456.

2 *Lansing v. Wiswall*, 5 Denio, 213.

3 *Gladfelter v. Walker*, 40 Md. 1, 14.

4 *Aldrich v. Wetmore*, 56 Minn. 20.

5 *Grandona v. Lovdal*, 70 Cal. 161; *Yolo County v. Sacramento*, 36 Cal. 193; *New York etc. R. R. Co. v. Rochester*, 127 N. Y. 591; *Hutchins v. Smith*, 63 Barb. 251; *Paddock v. Somes*, 102 Mo. 226; *Lefrois v. Monroe County*, 24 N. Y. App. Div. 421.

6 *Drinkwater v. Sanble*, 46 Kan. 170; and see *Lohmiller v. Water Power Co.*, 51 Wis. 683.

7 *Bailey v. Dale*, 71 Cal. 34.

8 *Foote v. Burlington Gaslight Co.*, 103 Iowa, 576; and so, to same effect, *Childs v. Railroad Co.*, 117 Mo. 414. Joinder of causes of action for nuisances and for personal injuries: See *Lamming v. Galusha*, 135 N. Y. 239.

§ 583. Same—Plea or Answer—Defenses.

All the material averments in the declaration in a common-law action on the case for a nuisance are put in issue by the plea of "not guilty." But such plea does not operate as a denial of an allegation by way of inducement, and the plaintiff is not bound to prove such allegation until an issue is made thereon.¹ Thus, in such action for a nuisance to the occupation of a house by carrying on an offensive trade, the plea of not guilty will operate as a denial only that the defendant carried on the alleged trade in such a way

as to be a nuisance to the occupation of the house, and will not operate as a denial of the plaintiff's occupation of the house.² It is held that the defendant may give in evidence a former recovery in an action on the case for a nuisance under the plea of not guilty.³ In an action for damages for the maintenance of a nuisance and for the abatement thereof, under the Wisconsin statute, facts showing that the abatement, as demanded in the complaint, would be inequitable may be set up in the answer.⁴ In such action the defendant may set forth in his answer such facts as may show that he is entitled to the affirmative interference of a court of equity to prevent the plaintiff from enforcing his legal right to an abatement.⁵ The fact that the defendant has a right by grant or prescription to maintain the alleged nuisance, and any facts which show that in equity the plaintiff should not be allowed to obtain the judgment demanded, may be set up as a defense.⁶ If a license from the municipal authorities to perform the act complained of as a nuisance be relied upon as a defense, it should be specially set up in the answer.⁷ In an action to recover damages for a nuisance in fouling a stream, a defense of prescription is insufficient unless it fully covers the use of the stream complained of.⁸ The fact that the plaintiff came to the nuisance complained of is no defense, in the absence of a

claim of prescriptive right by the defendant;⁹ nor is it any defense that there are similar establishments in the neighborhood;¹⁰ nor that the nuisance is necessary to the operation of the defendant's business;¹¹ nor that a great many others are committing similar acts of nuisance upon the same property.¹² Nor is it a sufficient defense that the business alleged to be a nuisance is per se lawful, and the use made by the defendant of his own property is reasonable.¹³ In an action to abate a nuisance caused by running a water ditch across the land of the plaintiff, allegations in the defendant's answer that it was mineral land belonging to the United States and that the ditch was for mining purposes are irrelevant, and held to constitute no defense.¹⁴ To a complaint in an action for damages for backing water to the plaintiff's mill by the erection of a dam on the stream below, the defendant pleaded a license and the expenditure of money on the faith thereof, and a reply by the plaintiff of a revocation of the license before the expenditure was made was held sufficient.¹⁵ In an action to abate a nuisance and for damages, the fact that the nuisance was voluntarily abated before the commencement of the suit does not affect the right of the plaintiff to recover damages for injuries sustained prior to that time.¹⁶

1 *Jessup v. Loucks*, 55 Pa. St. 350.

2 1 Chitty on Pleading, 16th Am. ed., 906.

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3 *Smith v. Elliott*, 9 Pa. St. 345; *Ellis v. Academy of Music*, 120 Pa. St. 608, 6 Am. St. Rep. 739; and see *Clark v. Lanier*, 104 Ga. 184.

4 *Lohmiller v. Water Power Co.*, 51 Wis. 683; *Pennoyer v. Allen*, 51 Wis. 360.

5 *Cobb v. Smith*, 23 Wis. 261; and see *Cobb v. Smith*, 38 Wis. 21.

6 *Pennoyer v. Allen*, 51 Wis. 360.

7 *Clifford v. Dam*, 81 N. Y. 52. Compare *Kuechenmeister v. Brown*, 13 Misc. Rep. 139.

8 *Nolan v. New Britain*, 69 Conn. 668.

9 *Susquehanna Fertilizer Co. v. Malone*, 73 Md. 268, 25 Am. St. Rep. 595. See sec. 564, ante.

10 *People v. Detroit etc. Lead Works*, 82 Mich. 471; *Lafin etc. Powder Co. v. Tearney*, 131 Ill. 322, 19 Am. St. Rep. 34.

11 *Shively v. Cedar Rapids etc. Ry. Co.*, 74 Iowa, 169, 7 Am. St. Rep. 471, and note.

12 *Woodyear v. Shaefer*, 57 Md. 9, 40 Am. Rep. 419; *Euler v. Sullivan*, 75 Md. 616, 32 Am. St. Rep. 420; and see *Beach v. Sterling etc. Zinc Co.*, 54 N. J. Eq. 65.

13 *Hurlbut v. McKane*, 55 Conn. 31, 3 Am. St. Rep. 17.

14 *Weimer v. Lowery*, 11 Cal. 104.

15 *Williamson v. Yingling*, 80 Ind. 379.

16 *Tuebner v. California St. Ry. Co.*, 66 Cal. 171; *Gleason v. Gary*, 4 Conn. 418.

§ 584. Evidence, Generally.

The question whether a thing is a nuisance or not must in general be settled as a question of fact.¹ Thus, the annoyances arising from the necessary use of a railroad is not a nuisance per se, and the fact of nuisance in such case must be determined by a jury.² A brass foundry and machinery incident thereto are not *prima facie*

nuisances, and one who complains of them must allege and prove that they are such by reason of their peculiar location, or the negligent manner in which they are conducted.³ It is an established rule that whoever abates an alleged nuisance, whether he be a public officer or private person, unless he acts under the judgment or order of a court having jurisdiction, does it at his peril, and when his act is challenged in a regular judicial tribunal it must appear that the thing abated was in fact a nuisance.⁴ In an action for damages for an alleged nuisance, the testimony of owners and occupants of property in the same neighborhood to the effect that they were annoyed and injured by the same nuisance is admissible, both to show the extent and character of the injury sustained by the plaintiff and that the business objected to as a nuisance was capable of inflicting such injury.⁵ On the other hand, the jury may infer that injuries received by a person from an alleged nuisance was due to his especial susceptibility, from testimony showing that a large number of other persons were exposed to the same influences, and were not affected by it to any appreciable extent.⁶ A defendant whose stables are complained of as a nuisance may show that the offensive odors and noises come, or might have come, from other sources.⁷ Evidence that another sewer did not produce offensive smells is

held to be inadmissible in an action for a nuisance caused by maintaining a sewer which emptied near the plaintiff's house, where it is not proposed to show that the two sewers were alike in their construction, and not subject to different conditions in their use.⁸ Evidence of the condition of the land prior to the nuisance complained of is admissible for the purpose of enabling the jury to determine whether, and to what extent, it has been affected by such nuisance.⁹ Where, in an action for a nuisance, it is shown that property has been injured by a nuisance, the burden is then upon the party maintaining the nuisance to show that the injury complained of proceeds from other and entirely separate causes.¹⁰ It is said that, usually, it becomes a mixed question of law and fact whether, on the case proved, the existence of a nuisance is established or not. But if it be clear upon the facts that a jury would not be authorized to find that a nuisance did exist, the court would be justified in ordering a nonsuit.¹¹ In an action for damages to the plaintiff's shade trees caused by escaping gas, evidence showing the condition of other trees in the immediate vicinity after the construction of the defendant's gas line is held competent upon the question of whether the escaping gas would account for the injury to the plaintiff's trees.¹²

1 Callanan v. Gilman, 107 N. Y. 360, 1 Am. St. Rep. 831; Des Plaines v. Poyer, 123 Ill. 348, 5 Am. St. Rep. 524.

2 Bell v. Ohio etc. R. R. Co., 25 Pa. St. 161, 64 Am. Dec. 687.

3 McMenomy v. Band, 87 Cal. 134.

4 People v. Board of Health etc., 140 N. Y. 1, 10, 37 Am. St. Rep. 522; Smith v. Irish, 55 N. Y. Supp. 837, 37 App. Div. 220. See sec. 570, ante.

5 Wylie v. Elwood, 134 Ill. 281, 23 Am. St. Rep. 673.

6 Price v. Grantz, 118 Pa. St. 402, 4 Am. St. Rep. 601.

7 Kaspar v. Dawson, 71 Conn. 405.

8 Randolph v. Bloomfield, 77 Iowa, 50, 14 Am. St. Rep. 268.

9 Aldworth v. Lynn, 153 Mass. 53, 25 Am. St. Rep. 608; and see Rosenthal v. Taylor etc. Ry. Co., 79 Tex. 325; State v. Holman, 104 N. C. 861.

10 Frost v. Berkeley Phosphate Co., 42 S. C. 402, 46 Am. St. Rep. 736.

11 Barnes v. Hathorn, 54 Me. 124, 128.

12 Evans v. Keystone Gas Co., 148 N. Y. 112, 42 N. E. Rep. 513, affirming 25 N. Y. Supp. 191.

§ 585. Judgment of Abatement.

In an action to abate a nuisance, a general verdict in favor of the plaintiff is sufficient to sustain a judgment for the abatement thereof.¹ But the recovery of damages in an action for a nuisance cannot have such conclusive effect as to make the issuance of a warrant for the abatement of the nuisance a matter of course.² It rests, to some extent, in the discretion of the court to grant or refuse the plaintiff's motion for the issue of a warrant to abate the nuisance.³ But

this is a legal discretion, to be exercised affirmatively whenever the interests or happiness of individuals or the community may require it.⁴ Generally, in an action for damages for a nuisance, where the plaintiff recovers, a judgment abating the nuisance is proper if the finding shows a proper case.⁵

1 Blood v. Light, 31 Cal. 115.

2 Cromwell v. Lowe, 14 Ind. 234; Kotherberthal v. Salem Co., 13 Or. 604.

3 Bemis v. Clark, 11 Pick. 452.

4 Maxwell v. Boyne, 36 Ind. 120.

5 Williamson v. Yingling, 93 Ind. 42.

§ 586. Successive Actions for Damages.

The general rule, well sustained by authority, is, that the originator of a nuisance remains liable to successive actions for damages resulting from its continuance, and he cannot release himself from such liability by a conveyance of the premises.¹ But this liability ceases with his death, and a cause of action does not survive against his legal representatives for damages arising from the continuance of the nuisance subsequent to his death.² Every continuance of the nuisance or recurrence of the injury is held to be an additional nuisance, forming in itself the subject matter of a new action.³ Where the nuisance is not of a permanent character, but is dependent on accidents and contingencies, so that it is of a transient nature, successive actions may be

maintained for injury resulting therefrom as it occurs.⁴ And an action for such injury will not be barred by the statute of limitations, unless the full period of the statute has run against the injury before suit.⁵ If, however, the nuisance is permanent and continuing, recovery for the entire damage resulting from it must be had in one suit.⁶ As illustrating the foregoing rules, it has been held that where a railway corporation or a municipality, under proper authority, erects an embankment in a street, and the work be carelessly and unskillfully done, whereby injury results to adjacent property, the corporation or municipality can be made liable in successive actions until the nuisance is abated.⁷ So if a railway company, lawfully located upon a city street, uses the street beyond what is necessary for the proper running of its trains, and by such excessive and improper use substantially affects the easement of way and of ingress and egress appurtenant to an abutting lot, the owner of such lot can maintain successive actions for such nuisances, recovering the damages that have accrued up to the time such action is instituted, and a recovery in one action will not bar a subsequent one brought for a continuance of these wrongs.⁸ So a nuisance arising from the discharge of a city's sewage near private property is held to be a recurring one, and will sustain successive actions

where the plan for sewers adopted by the city contemplates the discharge of the sewage at another point, and its discharge at the point in question is apparently only temporary.⁹ When a private structure or other work on land is the cause of a nuisance, the law cannot regard it as permanent, no matter with what intention it is erected, and damages therefor can be recovered only to the date of the institution of the action.¹⁰

1 Sloggy v. Dilworth, 38 Minn. 179, 8 Am. St. Rep. 656; Dorman v. Ames, 12 Minn. 451; McDonough v. Gilman, 3 Allen, 264, 80 Am. Dec. 72; Prentiss v. Wood, 132 Mass. 486; Eastman v. Amoskeag Mfg. Co., 44 N. H. 143, 82 Am. Dec. 201.

2 Sloggy v. Dilworth, 38 Minn. 179, 8 Am. St. Rep. 656.

3 Duryea v. Mayor etc., 26 Hun, 120; Pappenheim v. Railroad Co., 128 N. Y. 436, 26 Am. St. Rep. 486; Dority v. Dunning, 78 Me. 381.

4 Brewing Co. v. Compton, 142 Ill. 511, 34 Am. St. Rep. 92; Kinnaird v. Standard Oil Co., 89 Ky. 468, 25 Am. St. Rep. 545; Staple v. Spring, 10 Mass. 72.

5 Austin etc. Ry. Co. v. Anderson, 79 Tex. 427, 23 Am. St. Rep. 350.

6 Austin etc. Ry. Co. v. Anderson, 79 Tex. 427, 23 Am. St. Rep. 350; Hodge v. Shaw, 85 Iowa, 137, 39 Am. St. Rep. 290; and see to same effect, Brewing Co. v. Compton, 142 Ill. 511, 34 Am. St. Rep. 92; Watts v. Norfolk etc. Ry. Co., 39 W. Va. 196, 45 Am. St. Rep. 894; Van Hoozier v. Railroad Co., 70 Mo. 145; Denver City etc. Water Co. v. Middaugh, 12 Colo. 434, 13 Am. St. Rep. 234; Stodghill v. Railroad Co., 53 Iowa, 341; Beatrice Gas Co. v. Thomas, 41 Neb. 662, 43 Am. St. Rep. 711.

7 Uline v. New York etc. R. R. Co., 101 N. Y. 98, 54 Am. Rep. 661.

8 Harmon v. Railroad, 87 Tenn. 614.

9 *Chattanooga v. Dowling*, 101 Tenn. 342; and see *Nashville v. Comar*, 88 Tenn. 415, 418; *Sanderson v. Pennsylvania Coal Co.*, 102 Pa. St. 370; *Aldworth v. Lynn*, 153 Mass. 53, 25 Am. St. Rep. 608.

10 1 *Sedgwick on Damages*, 8th ed., sec. 93; *Brewing Co. v. Compton*, 142 Ill. 511, 34 Am. St. Rep. 92; and see *Hargreaves v. Kimberly*, 20 W. Va. 787, 53 Am. Rep. 121; *Wells v. New Haven etc. Co.*, 151 Mass. 46, 21 Am. St. Rep. 423.

§ 587. Equitable Remedy, Generally.

The concurrent jurisdiction of courts of equity with courts of law in cases of private nuisance dates back to an early period in the growth of the English equity system, and is now firmly established. There are, however, many cases of private nuisances which will sustain an action at law which will not justify relief in equity. In general terms, a court of equity will interfere when the injury by the wrongful act of the adverse party will be irreparable, as where the loss of health, the loss of trade, the destruction of the means of subsistence, or the ruin of the property must ensue. It will also give its aid to prevent oppressive and interminable litigation or a multiplicity of suits, or where the injury is of such a nature that it cannot be adequately compensated by damages at law, or is such as from its continuance or permanent mischief must occasion a constantly recurring grievance, which cannot be otherwise remedied than by injunctive relief.¹ The jurisdiction is founded on the ability of a

court of equity to afford more complete relief than courts of law can grant.² And it is held that the jurisdiction cannot be defeated by a partial abatement of the nuisance.³ But when the thing complained of is not a nuisance per se, and has not been declared a nuisance by a judgment at law, a case of pressing necessity must be shown before the court will interfere.⁴ Nor will the court interfere when the thing complained of is not in existence, but may be called into existence by threatened acts of the defendant in the exercise of his lawful dominion over his property, and it is uncertain, dependent upon circumstances in the future, whether it will or not operate injuriously.⁵ Ordinarily, a substantial right of property must be affected and the injury be of such character as to support an action at law. The injury must be tangible.⁶ The extent and character of the injury, the comparative value of the property affected, and other considerations which may present themselves under various circumstances ought to be weighed and relief afforded or withheld as equity and good conscience require.⁷ A party cannot act upon a mere fear or apprehension, or mere possibility or theoretical injury. If, however, the danger be probable and threatening, he may invoke the aid of equity and need not delay until the injury is actually inflicted.⁸ As a general rule, if a party has an adequate rem-

edy at law, a court of equity will not entertain jurisdiction.⁹ But the remedy in equity is said to exist whenever the nature of the injury is such that it cannot be adequately compensated by damages or will occasion a constantly recurring grievance.¹⁰ When the nature of the injury is such that the remedy by action at law is incomplete, the jurisdiction of equity is undoubted, and this without regard to whether or not there has been a recovery at law.¹¹ In a clear case a court of equity will grant relief against a continuing nuisance without waiting for a judgment at law establishing the fact of the nuisance and the plaintiff's legal right, but it will not interfere in a doubtful case until there has been such a judgment at law.¹² The equitable remedy to prevent the creation or continuance of a nuisance is not taken away by a statute giving a remedy by indictment.¹³ The federal courts have jurisdiction of a suit in equity brought to abate a nuisance.¹⁴ Such suit is local and can be brought only in the district where the nuisance is situated. If the nuisance was erected and is maintained by several persons or corporations, those not within the jurisdiction of the court need not be joined as defendants in the suit.¹⁵

1 See *State v. Wheeling etc. Bridge Co.*, 13 How. 518; *Parker v. Winnipiseogee etc. Woolen Co.*, 2 Black, 545; *Whitfield v. Rogers*, 26 Miss. 84, 59 Am. Dec. 244; *Holsman v. Boiling Springs Bleaching Co.*, 14 N. J.

Eq. 335, 343; *Oswald v. Wolf*, 129 Ill. 200; *United States v. Deba*, 64 Fed. Rep. 724; *Sellers v. Parvis etc. Co.*, 30 Fed. Rep. 164.

2 *Ogletree v. McQuaggs*, 67 Ala. 580, 42 Am. Rep. 112.

3 *Carlisle v. Cooper*, 21 N. J. Eq. 576.

4 *Kingsbury v. Flowers*, 65 Ala. 479, 39 Am. Rep. 14; and see to same effect, *Mirkil v. Morgan*, 134 Pa. St. 144; *Powell v. Furniture Co.*, 34 W. Va. 804; *Green v. Lake*, 54 Miss. 510, 28 Am. Rep. 378.

5 *St. James' Church v. Arrington*, 36 Ala. 546, 76 Am. Dec. 332; *Keiser v. Lovett*, 85 Ind. 240, 44 Am. Rep. 10; *Bowen v. Mauzy*, 117 Ind. 258.

6 *Janesville v. Carpenter*, 77 Wis. 288, 20 Am. St. Rep. 123; *Ryan v. Schwartz*, 94 Wis. 403.

7 *Hall v. Rood*, 40 Mich. 46, 29 Am. Rep. 528; *Turner v. Hart*, 71 Mich. 128, 15 Am. St. Rep. 243.

8 *Miley v. A'Hearn* (Ky. Ct. App.), 18 S. W. Rep. 529; *Bowen v. Mauzy*, 117 Ind. 258.

9 *Sherman v. Clark*, 4 Nev. 138, 97 Am. Dec. 516, and note.

10 *Woodyear v. Schaefer*, 57 Md. 1, 40 Am. Rep. 419; *Hamilton v. Whitridge*, 11 Md. 128, 69 Am. Dec. 184; *Nininger v. Norwood*, 72 Ala. 277, 47 Am. Rep. 412; *Lowe v. Prospect Hill Cem. Assn.*, 58 Neb. 94.

11 *Learned v. Hunt*, 63 Miss. 373; *Julienne v. Jackson*, 69 Miss. 34, 30 Am. St. Rep. 526.

12 *Turner v. Stewart*, 78 Mo. 480; *Harrelson v. Kansas etc. R. R. Co.*, 151 Mo. 482; *Vaughn v. Law*, 1 Humph. 123; *Weakley v. Page*, 102 Tenn. 178; *Oswald v. Wolff*, 129 Ill. 200; *Wood v. McGrath*, 150 Pa. St. 451.

13 *Minke v. Hofeman*, 87 Ill. 450, 29 Am. Rep. 63; *Carleton v. Rugg*, 149 Mass. 550, 14 Am. St. Rep. 446; *Barrett v. Mt. Greenwood Cem. Assn.*, 159 Ill. 385, 50 Am. St. Rep. 168; *Weakley v. Page*, 102 Tenn. 178.

14 See *Mississippi etc. R. R. Co. v. Ward*, 2 Black, 485; *State v. Wheeling etc. Bridge Co.*, 13 How. 518; *Indianapolis Water Co. v. American Strawboard Co.*, 53 Fed. Rep. 970; *Coosaw Min. Co. v. South Carolina*, 144 U. S. 550.

15 *Mississippi etc. R. R. Co. v. Ward*, 2 Black, 485.

§ 588. Same—Injunctive Relief.

The jurisdiction of a court of equity to restrain by an injunction the creation or continuance of a nuisance, either public or private, which is likely to produce irreparable injury, is well established and constantly exercised. This jurisdiction is held to be of the greatest utility, since, without it, persons would suffer, in many cases, the most grievous wrongs, for which actions at law would afford them no adequate redress.¹ The injury is irreparable if it is a grievous one, and not adequately reparable in damages.² And it is no answer to say that the owner of property may ward off the evil effects and consequences of a nuisance at his own expense.³ Nor can a trespasser who commits a nuisance by encroaching on the adjoining premises of another defeat the latter's right to an injunction, restraining the nuisance, by offering to buy the land encroached upon.⁴ The object of an action to enjoin a private nuisance is to prevent the defendant from using his property in such a manner as will disturb the plaintiff in the reasonable use and occupation of his property.⁵ And it is held that a use made by one of his property which works an irreparable injury to the property of his neighbor, or whereby the unwritten but accepted law of decency is violated, or which deprives his neighbor of the reasonable and comfortable use of his

property, or which will probably endanger the health and life of his neighbor, is a private nuisance which may be enjoined.⁶ The jurisdiction of a court of equity to restrain existing or threatened public nuisances by injunction, at the suit of a private person, who suffers therefrom a special and peculiar injury, distinct from that suffered by him in common with the public at large, is well established.⁷ But the court will not enjoin and abate a public nuisance unless the complainant avers and proves some injury special and peculiar to himself which is not shared by the general public.⁸ A house of ill-fame is held to be a public nuisance, wherever it may be situated, and its continuance may be enjoined by anyone who can show a special injury.⁹ In a suit brought to restrain the defendant from keeping a house of ill-fame, it was held that an unlawful use of property, which renders the premises of a neighbor unfit for comfortable or respectable occupation and enjoyment, is a private nuisance, against which the protection of a court of equity may be invoked, although the use complained of also constitutes a public nuisance.¹⁰ The continuance of a nuisance, not such per se, which renders the adjacent property less salable, or prevents the owner from advantageously letting the premises, or limits his demise thereof to less reputable tenants, is held to be insufficient to entitle him to equitable

relief, because the loss sustained in these particulars is capable of being compensated in an action for damages.¹¹ And it was held by the Kentucky court that an injunction would not be granted to suppress the keeping of a bawdy-house on certain premises, whereby the salable value of neighboring property was unfavorably affected. The criminal law was deemed to afford an adequate remedy.¹² But it has been repeatedly adjudged that the fact that a nuisance is a crime, and punishable as such, does not deprive equity of its jurisdiction to restrain and abate it by injunction.¹³ It was held that where the wrongful flowage of a meadow by a mill pond is made a criminal offense, punishable, on indictment, by fine and imprisonment, this does not take away the specific relief by a bill in equity by injunction.¹⁴ In Iowa, one who maintains a nuisance may not only be punished in a criminal proceeding, but a civil action at law to recover damages in a proper case, and an action in equity to restrain the nuisance may be prosecuted against him.¹⁵ So the Oregon statute providing a remedy at law for a private nuisance by an action for damages and an order to abate the nuisance is not exclusive, where immediate relief is demanded.¹⁶ And whenever a nuisance will cause irreparable injury, menace the life or health of the plaintiff or his family, or the guilty party is not able to respond in damages for

the injury, or where numerous actions will be required, equity has concurrent jurisdiction with the courts of law, within the meaning of the statute, and will enjoin the continuance of the objectionable conditions.¹⁷ But where a remedy at law is provided by statute, parties who wish to abate a nuisance must resort to the remedy so provided, unless special facts are alleged, showing that the remedy is insufficient or inadequate.¹⁸ And under ordinary circumstances, where there is no special injury to the complainant, and where the remedy by indictment is sufficient to abate the nuisance, equity will not interfere even on behalf of the public.¹⁹

1 See *Pruner v. Pendleton*, 75 Va. 516, 40 Am. Rep. 738; *Sanderlin v. Baxter*, 76 Va. 299, 44 Am. Rep. 165; *Clark v. Lawrence*, 6 Jones Eq. 83, 78 Am. Dec. 241; *Barnes v. Hathorn*, 54 Me. 124.

2 *Sanderlin v. Baxter*, 76 Va. 299, 44 Am. Rep. 165.

3 *Masonic Temple Assn. v. Banks*, 94 Va. 695; *Paddock v. Somes*, 102 Mo. 226.

4 *Hahl v. Sugo*, 57 N. Y. Supp. 920; 27 Misc. Rep. 1; and see *Pappenheim v. Railroad Co.*, 128 N. Y. 436, 28 Am. St. Rep. 486; *Henderson v. Railroad Co.*, 78 N. Y. 423; *Coatsworth v. Railroad Co.*, 156 N. Y. 451; *Rosenheimer v. Standard Gaslight Co.*, 55 N. Y. Supp. 192; 36 App. Div. 1.

5 *Lowe v. Prospect Hill Cem. Assn.*, 58 Neb. 94; and see *Smith v. Phillips*, 8 Phila. 10; *Jung v. Neraz*, 71 Tex. 396.

6 *Lowe v. Prospect Hill Cem. Assn.*, 58 Neb. 94; and see, also, *Farrell v. Cook*, 16 Neb. 483, 49 Am. Rep. 721; *Barton v. Union Cattle Co.*, 28 Neb. 350, 26 Am. St. Rep. 340; *Anheuser-Busch Brewing Assn. v. Peterson*, 41 Neb. 897; *Beatrice Gas Co. v. Thomas*, 41 Neb. 662, 43 Am. St. Rep. 711; *Adams v.*

Ohio Falls Car Co., 131 Ind. 375; Rodenhausen v. Craven, 141 Pa. St. 546, 23 Am. St. Rep. 306; Hurlbut v. McKone, 55 Conn. 31, 3 Am. St. Rep. 17; Gilford v. Babies' Hospital, 21 Abb. N. C. 159; Hayden v. Tucker, 37 Mo. 214.

7 See 3 Pomeroy's Equity Jurisprudence, sec. 1349; Smith v. Mitchell, 21 Wash. 536, 75 Am. St. Rep. 858.

8 Bigelow v. Hartford Bridge Co., 14 Conn. 565, 36 Am. Dec. 502; Shed v. Hawthorne, 3 Neb. 179; Anthony Shoe Co. v. West Jersey R. R. Co., 57 N. J. Eq. 607; Hinchman v. Paterson etc. R. R. Co., 17 N. J. Eq. 75, 86 Am. Dec. 252; Weakley v. Page, 102 Tenn. 178; Blagen v. Smith, 34 Or. 394.

9 Blagen v. Smith, 34 Or. 394; and so, to same effect, Hamilton v. Whitridge, 11 Md. 128, 69 Am. Dec. 184; Weakley v. Page, 102 Tenn. 178; Givens v. Van Studdiford, 4 Mo. App. 498.

10 Cranford v. Tyrrell, 128 N. Y. 341; and see Ogletree v. McQuaggs, 67 Ala. 580, 42 Am. Rep. 112; Holsman v. Boiling Springs Bleaching Co., 14 N. J. Eq. 335.

11 Lansing v. Smith, 8 Cow. 146; Ballentine v. Webb, 84 Mich. 38; Ryan v. Copes, 11 Rich. 217, 73 Am. Dec. 106; Gilbert v. Showerman, 23 Mich. 448; Gibson v. Douk, 7 Mo. App. 37.

12 Neaf v. Palmer (Ky. Ct. App.), 45 S. W. Rep. 506, citing Anderson v. Doty, 33 Hun, 160.

13 Ewell v. Greenwood, 26 Iowa, 377; State v. Crawford, 28 Kan. 726, 42 Am. Rep. 182; Attorney General v. Hunter, 1 Dev. Eq. 12; Weakley v. Page, 102 Tenn. 178, and cases cited in preceding section.

14 Wells v. Pierce, 27 N. H. 503.

15 Littleton v. Fritz, 65 Iowa, 488, 54 Am. Rep. 19.

16 Blagen v. Smith, 34 Or. 394.

17 Fleischner v. Citizens' Inv. Co., 25 Or. 119; and see Bushnell v. Robeson, 62 Iowa, 540; Wilmoth v. Woodcock, 58 Mich. 482.

18 Broomhead v. Grant, 83 Ga. 451; Rockland v. Rockland Water Co., 86 Me. 55.

19 State v. Morris etc. R. R. Co., 23 N. J. L. 360; Higgins v. Mayor etc., 8 N. J. Eq. 309; Attorney Gen-

eral v. New Jersey R. R. Co., 3 N. J. Eq. 136; Freeholders v. State, 42 N. J. L. 263; Anthony Shoe Co. v. West Jersey R. R. Co., 57 N. J. Eq. 607.

§ 589. Same—Establishment of Right at Law.

It is a general rule, formerly enforced with considerable strictness, that, before a court of equity will interfere by injunction to restrain a nuisance, the complainant must establish his right in a court of law.¹ The strictness of this rule has been to some extent relaxed, but the authorities are still agreed that to entitle a party to equitable relief before resorting to a court of law his case must be clear, so as to be free from all substantial doubt as to his right to relief.² If the thing sought to be enjoined as a nuisance is not unavoidably and in itself noxious, but only something that may, according to circumstances, prove so, the court will refuse to interfere until a hearing on the proofs, or until the matter has been tried at law.³ The fact of nuisance must be clearly made out upon determinate and satisfactory evidence, and if the evidence be conflicting, or there is an adequate remedy at law, the extraordinary interposition of the court will be withheld.⁴ Where the thing sought to be prohibited is per se a nuisance, an injunction will ordinarily be granted without waiting for the result of a trial at law.⁵ Where the existence of a nuisance has been established at law, the courts will grant an injunction, as a matter of course, if

the nuisance is of a continuous or constantly recurring character.⁶ And courts of equity will more readily interpose where the damages recovered in an action at law are merely nominal, and therefore inadequate to prevent a repetition of the injury.⁷ The erection of dams or other obstructions which materially affect the natural flow of a running stream, and injure the health of persons living in the neighborhood, has been restrained by injunction, without waiting the result of an action or the trial of an issue at law.⁸

1 See *New Castle v. Raney*, 130 Pa. St. 546; *Dwight v. Hayes*, 150 Ill. 273, 41 Am. St. Rep. 367.

2 *Oswald v. Wolf*, 129 Ill. 200; *Weakley v. Page*, 102 Tenn. 178; *Mowday v. Moore*, 133 Pa. St. 598; *Eastman v. Amoskeag Mfg. Co.*, 47 N. H. 71.

3 *Thebaut v. Canova*, 11 Fla. 143; *Shivery v. Streeper*, 24 Fla. 103; *Ogletree v. McQuaggs*, 67 Ala. 580, 42 Am. Rep. 112; *Kingsbury v. Flowers*, 65 Ala. 479, 39 Am. Rep. 14; *Nelson v. Milligan*, 151 Ill. 462.

4 *Harlan etc. Co. v. Paschall*, 5 Del. Ch. 435; *Wood v. McGrath*, 150 Pa. St. 451; *Robb v. La Grange*, 158 Ill. 21.

5 *Rouse v. Martin*, 75 Ala. 510, 51 Am. Rep. 463; *Iliff v. School Directors*, 45 Ill. App. 419.

6 *Paddock v. Somes*, 102 Mo. 226; *Harrelson v. Kansas City etc. Ry. Co.*, 151 Mo. 482.

7 3 *Pomeroy's Equity Jurisprudence*, secs. 1347, 1350; *Paddock v. Somes*, 102 Mo. 226.

8 *Whitfield v. Rogers*, 26 Miss. 84, 59 Am. Dec. 244; *Sprague v. Rhodes*, 4 R. I. 301; *Ogletree v. McQuaggs*, 67 Ala. 580, 42 Am. Rep. 112.

§ 590. Same—Parties.

A suit cannot be maintained to enjoin a nuisance which injures the complainant only in rights enjoyed by him as one of the public. In such case an information must be filed for the public in the name of the attorney general or other proper officer on behalf of the state.¹ And it makes no difference as to the remedy that the individual would be much more inconvenienced by the nuisance than many others.² A private person is not authorized to maintain a suit to restrain a public nuisance, unless he suffers or is threatened with special damage, different in kind from that sustained by the public generally.³ A municipality, as the representative of the public, may sue to abate or prevent a nuisance upon public property within its limits.⁴ A municipal corporation, in the exercise of a granted power to "restrain, prohibit, or suppress" a public nuisance, may, under proper circumstances, invoke the aid of a court of equity.⁵ It is settled law in Wisconsin that a city or village, in its corporate capacity, may maintain a suit in equity to prevent threatened obstructions or serious unlawful injuries to public streets.⁶ So, in California, a city, as the representative of the state, has the right to pursue all the ordinary civil remedies for enjoining or abating a public nuisance upon its streets or squares.⁷ And it is held that a city has a standing in equity to maintain a suit for an injunction to

restrain persons from obstructing a wharf which has been dedicated to public use.⁸ Several landowners who are injured by the maintenance of a nuisance may join as plaintiffs in a bill filed solely for injunctive relief.⁹ Several owners of lots abutting on a street, along which the municipality is threatening wrongfully to construct a drain, may sue jointly for an injunction.¹⁰ But although several may join in a suit to restrain a nuisance which is common to all, and affects each in the same way, yet where several persons own distinct parcels of land, or occupy different dwellings, and have no common interest, seek to restrain a nuisance in consequence of the special injury done to each particular property, each must bring a separate suit and obtain relief, if at all, on his own special wrong.¹¹ Life tenants may be joined as parties plaintiff with the remaindermen in a suit to restrain a nuisance.¹² It is held that a tenant from month to month has not such an interest in the premises as will enable him to maintain a suit for an injunction to restrain a nuisance injurious to his possession.¹³ But such relief may be granted to tenants for a term of years or for life;¹⁴ and to a tenant for a single year.¹⁵ If several parties are improperly joined as plaintiffs, the bill or complaint is demurrable on the ground of misjoinder of parties.¹⁶ All persons contributing to a nuisance and interested in its maintenance may be joined as defendants in a suit for

an injunction to restrain the nuisance.¹⁷ Both lessor and lessee of the structure constituting the nuisance are held to be proper parties defendant in a suit to enjoin the nuisances.¹⁸ But a bill against a city to abate a nuisance caused by its sewer system, joining as defendants certain residents of the city as individuals, but who, as such, have no legal interest in the suit, is held to be multifarious.¹⁹

1 Higbee v. Camden etc. R. R. Co., 19 N. J. Eq. 277; Attorney General v. Tarr, 148 Mass. 309; Meiners v. Brewing Co., 78 Wis. 364; Harlan etc. Co. v. Paschall, 5 Del. Ch. 435; Denver v. Mullen, 7 Colo. 345; United States v. Debs, 64 Fed. Rep. 724.

2 Anthony Shoe Co. v. West Jersey R. R. Co., 57 N. J. Eq. 607.

3 Brown v. De Groff, 50 N. J. L. 409, 7 Am. St. Rep. 794; Van Wagenen v. Cooney, 45 N. J. Eq. 24; Wellborn v. Davies, 40 Ark. 83; and see sec. 579, ante.

4 Coast Co. v. Mayor etc., 56 N. J. Eq. 615. Bill by a city water board to abate a nuisance sustained: See Board of Water Commrs. v. Detroit, 117 Mich. 458.

5 Huron v. Bank of Volga, 8 S. Dak. 449, 59 Am. St. Rep. 769; and see, also, New Orleans v. Lambert, 14 La. Ann. 244; Denver v. Mullen, 7 Colo. 345; Waterloo v. Union Mill Co., 72 Iowa, 437; Pine City v. Munch, 42 Minn. 342.

6 Neshkoro v. Nest, 85 Wis. 126; Eau Claire v. Matzke, 86 Wis. 291, 39 Am. St. Rep. 900; and see Burlington v. Schwarzman, 52 Conn. 181, 52 Am. Rep. 571; Reed v. Mayor etc., 92 Ala. 339.

7 People v. Holladay, 93 Cal. 248, 27 Am. St. Rep. 186; San Francisco v. Buckman, 111 Cal. 25.

8 Pittsburg v. Epping-Carpenter Co., 194 Pa. St. 318.

9 Turner v. Hart, 71 Mich. 128, 15 Am. St. Rep. 243; Rowbotham v. Jones, 47 N. J. Eq. 337; Snyder v. Cabell, 29 W. Va. 48.

10 *Sullivan v. Phillips*, 110 Ind. 320; and see *Atchison etc. Ry. Co. v. Nave*, 38 Kan. 744, 5 Am. St. Rep. 800; *Tate v. Ohio etc. R. R. Co.*, 10 Ind. 174, 71 Am. Dec. 309, and note.

11 *Demarest v. Hardham*, 34 N. J. Eq. 469; *Rowbotham v. Jones*, 47 N. J. Eq. 337.

12 *Rainey v. Herbert*, 55 Fed. Rep. 443.

13 *Clarke v. Thatcher*, 9 Mo. App. 436.

14 *Raband v. Frank*, 7 Mo. App. 64; *Delaney v. Blizzard*, 7 Hun, 7; *Jung v. Neraz*, 71 Tex. 396; *Lowe v. Prospect Hill Cem. Assn.*, 58 Neb. 94; *Central R. R. Co. v. English*, 73 Ga. 366.

15 *Walker v. Walker*, 51 Ga. 22.

16 *Fogg v. Nevada etc. Ry. Co.*, 20 Nev. 429; and see *Tate v. Ohio etc. Ry. Co.*, 10 Ind. 174, 71 Am. Dec. 309; *Demarest v. Hardham*, 34 N. J. Eq. 472.

17 See *Woodyear v. Schaefer*, 57 Md. 1, 40 Am. Rep. 419; secs. 576, 577, ante.

18 *O'Sullivan v. New York etc. Ry. Co.*, 7 N. Y. Supp. 51; *Robinson v. Smith*, 7 N. Y. Supp. 31; *Bridge Co. v. Lewis*, 63 Barb. 114, 115; *Martin v. Blattner*, 68 Iowa, 286. See sec. 576, ante.

19 *Carmichael v. Texarkana*, 94 Fed. Rep. 561. See *Barcus v. Gates*, 89 Fed. Rep. 783, 791; *Brown v. Safe Deposit Co.*, 128 U. S. 403, as to what constitutes multifariousness.

§ 591. Same—Bill or Complaint.

A bill or complaint seeking injunctive relief against a nuisance should allege facts sufficient to authorize a decree for the relief asked. Facts must be shown to enable the court to judge whether the injury will be of the character stated, and such as will clearly authorize an injunction before the party will be entitled to the interposition of the court.¹ It was also held that a bill against a private nuisance should show plainly

that the complainant is without a remedy at law.² The interest or title of the complainant in the premises affected by the nuisance should be set out with sufficient certainty. But if he alleges himself to be the owner of the premises in fee simple by purchase, and to be in possession, it is enough.³ In an action to abate a nuisance, the complaint was held to be radically defective in failing to allege that the plaintiff possessed the right to use the canyon, the obstruction of which constituted the nuisance.⁴ So where the action was brought under the Wisconsin statute to abate a private nuisance, the complaint was held to be insufficient in failing to allege that the plaintiff had any title or vested interest in the land.⁵ A complaint in a suit by a private person to enjoin a public nuisance must allege the facts which go to show the specific injury to the plaintiff, and a general allegation that damages have resulted or will result is not sufficient. He must allege and show a special injury to himself, not suffered in common with the public.⁶ In a suit to restrain a threatened injury, it is not enough that the complainant should allege in his bill or complaint that the injury will be irreparable to himself or to his family or property, but he must show facts, to enable the court to judge if the injury will be of the character stated, before he will be entitled to the interposition of the court. It is not sufficient to state opinions merely.⁷ Equity

will not restrain that which is not a nuisance upon the claim that it may be so used as to constitute a nuisance.⁸ Thus, it is held that the erection of a building which will not of itself constitute a nuisance will not be enjoined because the use to which it is designed to be put would constitute such a nuisance.⁹ Nor will a person be restrained by injunction from commencing the operation of a business in itself legitimate, unless it is made to appear that the defendant threatens and intends to conduct the business in a manner which will constitute a nuisance.¹⁰

1 *Shivery v. Streeper*, 24 Fla. 103; *Androscoggin etc. R. R. Co. v. Railroad Co.*, 49 Me. 392, 403; *Tye v. Catching*, 78 Ky. 463.

2 *Parker v. Winnipiseogee etc. Woolen Co.*, 2 Black, 545. But compare *Aldrich v. Howard*, 7 R. I. 87, 80 Am. Dec. 636. Also, *International etc. Ry. Co. v. Davis* (Tex. Civ. App.), 29 S. W. Rep. 483, holding that a petition for an injunction to restrain a nuisance, alleging that the plaintiff is injured thereby, need not allege that the injury is irreparable, or that there is no adequate remedy at law. And see *Galveston etc. Ry. Co. v. Tait*, 63 Tex. 223, 226.

3 *Vanwinkle v. Curtis*, 3 N. J. Eq. 422. See sec. 578, ante; also, *Bushnell v. Robeson*, 62 Iowa, 540.

4 *Stone v. Bumpus*, 40 Cal. 428.

5 *Denner v. Chicago etc. Ry. Co.*, 57 Wis. 218.

6 *Payne v. McKinley*, 54 Cal. 532; *Packet Co. v. Sorrels*, 50 Ark. 466; *Smith v. McDowell*, 148 Ill. 51. See sec. 580, ante.

7 *Thebaut v. Canova*, 11 Fla. 143; *Dunn v. Austin*, 77 Tex. 139.

8 *Cleveland v. Citizens' etc. Co.*, 20 N. J. Eq. 201; *Keiser v. Lovett*, 85 Ind. 240, 44 Am. Rep. 10; and see sec. 587, ante.

9 *Dalton v. Cleveland etc. Ry. Co.*, 144 Ind. 121; *Bristol Door etc. Co. v. Bristol*, 97 Va. 304, 75 Am. St. Rep. 783; *Trulock v. Merte*, 72 Iowa, 510.

10 *Bowen v. Mauzy*, 117 Ind. 258; and see *Owen v. Phillips*, 73 Ind. 284; *Windfall Mfg. Co. v. Patterson*, 148 Ind. 414, 62 Am. St. Rep. 532; *Cleveland v. Citizens' etc. Co.*, 20 N. J. Eq. 201. Compare *Aldrich v. Howard*, 7 R. I. 87, 80 Am. Dec. 636.

§ 592. Decree—What Relief Granted.

The powers of a court of equity in regard to nuisances are corrective as well as preventive, and it may order their abatement, as well as restrain their erection.¹ But it is asserted as a general rule that such relief will not be granted unless made the subject of a special prayer.² The action should not be regarded as one to abate a nuisance unless the complaint demands that judgment, although the facts stated may entitle the plaintiff to that relief.³ It is, however, held that where an action is brought for the abatement of a nuisance, an injunction against its continuance may be issued therein, although it is not specifically prayed for in the complaint.⁴ It is said that alleged nuisances ought not, in ordinary cases, be abated by preliminary injunction, and that mandatory preliminary injunctions are seldom granted, and only in a peculiar class of cases. But a nuisance which obstructs the free use of property, and interferes with its comfortable enjoyment, may be abated by a mandatory injunction, or by a judgment that the obstruction be removed and the nuisance abated.⁵ An injunction

restraining the conduct of a legitimate business should go no further than is absolutely necessary to protect the rights of the persons seeking the injunction. If the business can be conducted in such a way as not to constitute a nuisance, then it should be permitted to be continued in that manner.⁶ If the court finds a trade or business to be a nuisance as conducted, the defendant should be permitted to show, if he can, that it is possible to continue it in the same place without its being a nuisance. And if this can be done, the court should by its decree determine the condition upon which its continuance will be permitted.⁷ If the grievances complained of can be remedied by scientific and skillful appliances, a court of equity will go no further than to require such appliances to be used.⁸ Only the causes of the specific injurious effects proved should be enjoined, leaving the defendant at liberty to operate his works, if he can, and elects to do so, in such a manner as to remove the cause and prevent the injury.⁹ A court of equity will not grant a kind of relief out of all proportion to the nature or extent of the injury done, or likely to be sustained, by the maintenance of the nuisance.¹⁰ Where the injuries result from the maintenance of a mill dam at an improper height, a judgment is proper directing the lowering of the dam to such a height as will abate the nuisance.¹¹ But it is held that this relief is not a matter of right, but of equitable dis-

cretion in the court, and must depend upon the circumstances of the particular case.¹² The decree granting injunctive relief should specifically point out the things that the defendant is required to do, and to refrain from doing, in order to abate the nuisance, and, failing in this respect, the decree is held to be defective.¹³ If the complaint and verdict are so uncertain as to the location of the obstruction causing the nuisance that no definite order of abatement can be based thereon, a motion to modify the decree so as to eliminate the order of abatement is proper and should be sustained.¹⁴

1 Van Bergen v. Van Bergen, 2 Johns. Ch. 272; Earl v. De Hart, 12 N. J. Eq. 280, 72 Am. Dec. 395.

2 Delaware etc. Transp. Co. v. Camden etc. R. R. Co., 16 N. J. Eq. 321, 379.

3 Cobb v. Smith, 23 Wis. 261.

4 Sullivan v. Royer, 72 Cal. 248, 1 Am. St. Rep. 51.

5 Gardner v. Stroeve, 89 Cal. 26.

6 Chamberlain v. Douglas, 24 N. Y. App. Div. 582; Seifried v. Hays, 81 Ky. 377, 50 Am. Rep. 167; McClung v. North Bend etc. Coke Co., 18 Ohio Cir. Ct. Rep. 864.

7 Bushnell v. Robeson, 62 Iowa, 540; Shivas v. Olinger, 50 Iowa, 571, 32 Am. Rep. 138; and see Baker v. Bohannon, 69 Iowa, 60.

8 Green v. Lake, 54 Miss. 540, 28 Am. Rep. 378.

9 Sullivan v. Royer, 72 Cal. 248, 1 Am. St. Rep. 51; McMenemy v. Baud, 87 Cal. 134.

10 Hall v. Rood, 40 Mich. 46, 20 Am. Rep. 528; Shepard v. People, 40 Mich. 487; Big Rapids v. Comstock, 65 Mich. 78; Fresno v. Fresno etc. Milling Co., 98 Cal. 179.

11 Rothery v. New York Rubber Co., 90 N. Y. 30; Corning v. Troy etc. Nail Factory, 40 N. Y. 192;

Carlisle v. Cooper, 21 N. J. Eq. 576; Turner v. Hart, 71 Mich. 128, 15 Am. St. Rep. 243.

12 Miller v. Cornwell, 71 Mich. 270.

13 Ballentine v. Webb, 84 Mich. 38. Compare Learned v. Hunt, 63 Miss. 373.

14 American Furniture Co. v. Batesville, 139 Ind. 77.

§ 593. Damages—Recovery and Measure of.

In an action in the nature of an action on the case for a private nuisance, it is not essential to a recovery that the plaintiff should prove actual damage. He may, and it is often important to him, where his legal right has been violated, that he should, establish that legal right, though he has suffered no substantial injury.¹ And where in the trial of such action to recover damages for a continuing nuisance the jury find that the plaintiff has suffered no special damage, and yet find that a nuisance exists, nominal damages may be properly awarded in a verdict.² As a general rule, damages to property, temporary in their nature and continuing while the nuisance lasts, can only be measured by the rental value, or the difference between the rental value free from the effects of the nuisance and subject to it.³ And this rule is held to apply whether the property affected is in the possession of a tenant or in the occupation of the owner.⁴ But the rule does not apply where the enjoyment of a homestead is destroyed or diminished. In such case the plaintiff is entitled to recover for the inconvenience and discomfort

suffered, and the deprivation of the comfortable enjoyment thereof by himself and his family, and he is not limited to the damages sustained by the depreciation of the rental value of the property.⁵ Injury to the health of a person resulting from a private nuisance located near his residence is held to be a proper element of damage.⁶ Where the result of a nuisance is a permanent injury to the realty, the measure of compensation is the actual diminution in the market value of the premises for any use to which they may reasonably be put.⁷ Whenever the nuisance is of a permanent or continuing character, a single recovery may be had for the whole damages, whether past or prospective, resulting from the nuisance. In such cases the damages can be estimated, and may be at once fully compensated and successive actions cannot be brought.⁸ But where the nuisance is of a transient nature merely, successive actions may be maintained for the resulting injury as it occurs,⁹ and, as a general rule, damages can be recovered only for the injury sustained up to the time of the commencement of the action.¹⁰ But in an action for an injunction against a nuisance, or for its abatement in some other way, all damages sustained prior to the trial are held to be recoverable.¹¹ In Texas, when the action is brought not only to recover damages but to abate the nuisance, it is held that, in order to avoid a multiplicity of suits, a recovery may be had for

all damages sustained down to the date of the trial.¹² In an action by an adjoining landowner to recover for injury to his crops and soil, arising from a coke manufactory, carefully operated, he is entitled to recover only his actual loss in the products of his farm or the destruction of his soil, or both, sustained within the period of the statute of limitations. He cannot recover exemplary damages, nor is the rule as to damages for a taking by eminent domain applicable, and evidence not tending to prove the actual damages sustained is inadmissible.¹³ Where, by reason of remedial defects in the machinery of a manufactory, the premises of an adjoining owner sustain injury, he may recover damages for the nuisance during the time it existed, although the owner of the machinery used due diligence in setting it up and in obviating the nuisance subsequently.¹⁴ In a suit in equity brought by an individual to abate a nuisance caused by the construction by a city of its sewer system, and to recover damages caused thereby, such damages only as are proved to have been sustained up to the time of the decree are held to be recoverable.¹⁵

1 See *Smith v. McConathy*, 11 Mo. 517; *Freundstein v. Heine*, 7 Mo. App. 287; *Watson v. Van Meter*, 43 Iowa 76; *Tootle v. Clifton*, 22 Ohio St. 247, 10 Am. Rep. 732.

2 *Farley v. Gate City Gaslight Co.*, 105 Ga. 323.

3 *Loughran v. Des Moines*, 72 Iowa, 382; *Shively v. Cedar Rapids etc. Ry. Co.*, 74 Iowa, 169, 7 Am. St. Rep. 471; *Givens v. Van Studdiford*, 86 Mo. 149, 56 Am. Rep. 421; *Jutte v. Hughes*, 67 N. Y. 267.

4 *Francis v. Schoellkopf*, 53 N. Y. 152; *Mortimer v. Railroad Co.*, 129 N. Y. 81; *Rosenheimer v. Standard Gaslight Co.*, 55 N. Y. Supp. 192, 36 N. Y. App. Div. 1.

5 *Randolph v. Bloomfield*, 77 Iowa, 50, 14 Am. St. Rep. 268.

6 *Rosenheimer v. Standard Gaslight Co.*, 55 N. Y. Supp. 192, 36 N. Y. App. Div. 1; *Chapman v. Rochester*, 110 N. Y. 273, 6 Am. St. Rep. 366; *Pierce v. Wagner*, 29 Minn. 355.

7 *Denver v. Bayer*, 7 Colo. 113; *Denver etc. Ry. Co. v. Bowine*, 11 Colo. 59; *Central etc. Ry. Co. v. Andrews*, 41 Kan. 370; *South Bend v. Paxon*, 67 Ind. 228; *Vanderslice v. Philadelphia*, 103 Pa. St. 102.

8 *Powers v. Council Bluffs*, 45 Iowa, 652, 24 Am. Rep. 792; *Irrigation etc. Co. v. Middaugh*, 12 Colo. 434, 13 Am. St. Rep. 234; *St. Louis etc. Ry. v. Biggs*, 52 Ark. 240, 20 Am. St. Rep. 174; *Hodge v. Shaw*, 85 Iowa, 137, 39 Am. St. Rep. 290. See sec. 586, ante.

9 See *St. Louis etc. Ry. Co. v. Biggs*, 52 Ark. 240, 20 Am. St. Rep. 174; *Hudson v. Burk*, 48 Mo. App. 314; sec. 586, ante.

10 *Irrigation etc. Co. v. Middaugh*, 12 Colo. 434, 13 Am. St. Rep. 234; *Pinney v. Berry*, 61 Mo. 359; *Stadler v. Grieben*, 61 Wis. 500; *McGuire v. Grant*, 25 N. J. L. 356, 67 Am. Dec. 49; *Dority v. Dunning*, 78 Me. 381; *Sanderson v. Pennsylvania Coal Co.*, 102 Pa. St. 370; *Hughes v. Anderson*, 68 Ala. 280, 44 Am. Rep. 147.

11 *Beir v. Cook*, 37 Hun, 38; and see *Fritz v. Hobson*, L. R. 14 Ch. Div. 542.

12 *Comminge v. Stevenson*, 76 Tex. 642.

13 *Robb v. Carnegie*, 145 Pa. St. 324, 27 Am. St. Rep. 694.

14 *Moon v. National Wall-Plaster Co.*, 31 Misc. Rep. 631, 66 N. Y. Supp. 33; and see *Fach v. Geoffroy*, 67 Hun, 401; *Campbell v. Seaman*, 63 N. Y. 568, 20 Am. Rep. 567; *Yocum v. Hotel St. George Co.*, 18 Abb. N. C. 840; *Bohan v. Port Jervis Gaslight Co.*, 122 N. Y. 18.

15 *Carmichael v. Texarkana*, 94 Fed. Rep. 561.

CHAPTER XXXVII.

DOWER—REMEDIES FOR RECOVERY OF.

- § 594. In general—Jurisdiction.
- § 595. Common-law writ of dower.
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- § 599. Demand.
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§ 594. In General—Jurisdiction.

The nature of the right of dower, and the principles of law applicable thereto, were made the subject of an earlier chapter,¹ reserving the matter of remedies for the recovery of dower, and

the modes of procedure therein for more appropriate consideration in the present volume. Dower is strictly a common-law right, and is properly cognizable in courts of common law, and it has been doubted whether such courts did not have exclusive jurisdiction in matters of dower.² But it is now the established doctrine that courts of equity have concurrent jurisdiction with courts of law upon the subject of dower.³ Such concurrent jurisdiction undoubtedly exists in the assignment of dower.⁴ In many cases the exercise of equity jurisdiction is absolutely essential to the ends of justice, since full and adequate remedy cannot be had at law. But a court of equity will not try a question of legal title, nor decide whether the widow is legally entitled to dower. If the title to dower is disputed, the right must be established at law.⁵ In many of the states, courts having power to exercise probate jurisdiction are invested by statute with jurisdiction in matters of dower.⁶ But courts of equity are not thereby ousted of their jurisdiction in such matters. The remedy given by statute or constitutional provision is to be regarded as cumulative, and was not designed to impair or in any way affect the ancient equity jurisdiction where it is not so expressly provided.⁷

1 See vol. 1, c. VI.

2 See *Harrison v. Eldridge*, 7 N. J. L. 392, 401.

3 *Swaine v. Perine*, 5 Johns. Ch. 482, 9 Am. Dec. 318; *Blain v. Harrison*, 11 Ill. 384; *Wells v. Sprague*, 10 Ind. 305; *Campbell v. Murphy*, 2 Jones Eq. 357; *Menifee v. Menifee*, 8 Ark. 9; *Bishop v. Woodward*, 103 Ga. 281; *Powell v. Manufacturing Co.*, 3 Mason, 347; *Herbert v. Wren*, 7 Cranch, 370.

4 *Brooks v. Woods*, 40 Ala. 538; *Starry v. Starry*, 21 Iowa, 254; *Thomas v. Thomas*, 73 Iowa, 657; and see *Richards v. Bellingham Bay Land Co.*, 47 Fed. Rep. 854; *Mathewson v. Phoenix Iron Foundry*, 20 Fed. Rep. 281.

5 *Palmer v. Casperson*, 17 N. J. Eq. 204; *Rockwell v. Morgan*, 13 N. J. Eq. 384. See *Drost v. Hall*, 52 N. J. Eq. 68.

6 See *Coates v. Cheever*, 1 Cow. 460; *Thomas v. Thomas*, 73 Iowa, 657; *Clemons v. Heelan*, 52 Neb. 257; *Way v. Way*, 42 Conn. 52.

7 *Menifee v. Menifee*, 8 Ark. 9, 38; *Owen v. Slatter*, 26 Ala. 547, 62 Am. Dec. 745; *Wood v. Morgan*, 56 Ala. 397; *Sheppard v. Sheppard*, 87 Ala. 560; *Jones v. Jones*, 28 Ark. 19.

§ 595. Common-law Writ of Dower.

At common law, the legal remedy to enforce an assignment of dower was by a writ of dower unde nihil habet, or by a writ of right of dower, brought against the tenant of the freehold; upon which, if the demandant obtained judgment, dower was assigned by the sheriff on the land, and she could then proceed to recover possession by ejectment.¹ By reason of the jurisdiction assumed by courts of equity in modern times of setting out dower, the prosecution of a writ of dower has become a matter of rarity in England as well as in the United States. But in some of the states the right of the widow to resort to this remedy is

recognized, though she is not confined to it.² Writ of dower unde nihil habet is an unusual, though an appropriate, remedy for obtaining dower in Kentucky.³ The widow may resort to an action of dower in Pennsylvania. She may claim her statutory dower by the common-law action of dower where the land is in the adverse possession of one denying her right, or of one not amenable to the orphans' court process.⁴ It was held that the widow of an intestate, who was tenant in common of certain land, could maintain a writ of dower, as at common law, for her third of her husband's proportion of the land.⁵ The early New York statute on the subject recognized the right of the widow to proceed by the common-law writ of dower, but the action of ejectment was subsequently substituted in its stead. But this substitution was held to affect only the forms or mode of proceeding in prosecuting the suit, and did not alter or modify the right or interest of the widow in the land.⁶ The common-law proceedings for dower were abolished under the laws of Mississippi, and a summary proceeding adopted in their stead.⁷ But dower is now entirely abolished in that state.⁸ Dower is a real and local action, one for the recovery of real estate, and cannot be brought except in the county where the land lies.⁹

1 Park's Law of Dower, 283; and see *Jackson v. Hixon*, 17 Johns. 123; *Borst v. Griffin*, 9 Wend. 307; *Rice v. Nelson*, 27 Iowa, 148, 154.

2 So in New Jersey: *Rogers v. Potter*, 32 N. J. L. 78.

3 *Waters v. Gooch*, 6 J. J. Marsh. 587, 22 Am. Dec. 108.

4 *Evans v. Evans*, 29 Pa. St. 277; *Gourley v. Kinley*, 66 Pa. St. 270; and see *Evans v. Evans*, 9 Pa. St. 190; *Galbraith v. Green*, 13 Serg. & R. 85; *Tatham v. Ramey*, 82 Pa. St. 130.

5 *Brown v. Adams*, 2 Whart. 188.

6 *Yates v. Paddock*, 10 Wend. 529. See *Ellicott v. Mosier*, 7 N. Y. 201.

7 *Caillaret v. Bernard*, 7 Smedes & M. 316; *Pickens v. Wilson*, 13 Smedes & M. 691.

8 Rev. Code 1880, sec. 1170. And see vol. 1, sec. 52, ante.

9 *Tatham v. Ramey*, 82 Pa. St. 130; and see *Anderson v. Sterritt*, 79 Ky. 490.

§ 596. Statutory Proceedings.

In many of the states the recovery of dower is controlled and regulated by statutory provisions, and jurisdiction is usually conferred upon such courts in the state as exercise probate jurisdiction.¹ A proceeding for dower in North Carolina is classed as a special proceeding.² The summary proceeding provided by the Florida statutes (Act of 1828) is a substitute for the common-law writ to obtain dower, and was intended to relieve the widow of the delay and cumbrous machinery of that law. It is a proceeding at law, and therefore appropriate to a court of law, as distinguished from a court of chancery. The circuit court has concurrent jurisdiction with the county court to

assign dower in accordance with this summary remedy.³ In addition to the special proceeding in the county court provided by statute in Iowa, and to a petition in equity, a widow may recover her dower by an action under the statute (Revision of 1860, c. 144), providing for actions for the recovery of real property.⁴ In Nebraska, where the right of dower of a widow is not disputed, it may be assigned by the county court, as provided by statute. If such a right is disputed, it may be established by a decree of the district court.⁵ The statutory remedy provided by the Georgia Civil Code, sections 4697 et seq., for the assignment of dower, must be followed in all cases where applicable and adequate. But where the aid of equity is necessary to the perfect enjoyment by the dowress of her estate when set apart, application may be made in the first instance to the superior court as a court of equity, not only for the equitable relief necessary to secure to the dowress the enjoyment of the property set apart, but also for the assignment of the dower.⁶

1 See *Hilliard v. Hilliard*, 50 Ark. 34; *Eddy v. Moulton*, 13 R. I. 105; *Sheafe v. O'Neil*, 9 Mass. 9; *Farrow v. Farrow*, 1 Del. Ch. 457; *Bradfords v. Kents*, 43 Pa. St. 474; sec. 594, ante.

2 *Tate v. Powe*, 64 N. C. 644; and see *Brittain v. Mull*, 91 N. C. 498, wherein the procedure is pointed out in detail.

3 *Henderson v. Chaires*, 25 Fla. 26.

4 *Rice v. Nelson*, 27 Iowa, 148. See *Thomas v. Thomas*, 73 Iowa, 657.

5 *Clemons v. Heelan*, 52 Neb. 287. See *Guthman v. Guthman*, 18 Neb. 98; *Serry v. Curry*, 26 Neb. 353.

6 *Bishop v. Woodward*, 103 Ga. 281; and see *Danforth v. Smith*, 23 Vt. 247.

§ 597. Ejectment.

At common law, ejectment is not maintainable by a widow for her dower until it has been set off to her.¹ Until dower is legally assigned or set off, the person entitled to the fee may bring ejectment against one wrongfully in possession, and recover.² And dower before assignment cannot be transferred by the widow to a stranger so as to enable him to set it up as a defense to an action of ejectment by the heirs.³ In Pennsylvania, the widow cannot join with the heirs in ejectment for her husband's land, nor maintain ejectment for her interest in the lands of which her husband died seised.⁴ But the heir cannot turn her out of possession, by an action of ejectment, before any proceedings have been taken for the partition of the estate.⁵ By statute in some of the states, the action of ejectment has been substituted for the writ of dower. But this statutory substitution of ejectment in lieu of the writ of dower affects only the forms or mode of proceeding in prosecuting the suit, and does not alter or modify the right or interest of the widow in the land.⁶ In New York, the action of dower was

abolished in 1830, and the action of ejectment substituted in its place by the provisions of the Revised Statutes. Under these provisions, a widow's action of ejectment for dower must be brought against the actual occupant of the land of which she is dowable, and not as in the former action of dower against the tenant of the freehold.⁷ But the action will not lie against a remainderman during the continuance of the particular estate.⁸ In Michigan, dower, like other landed interests, can be reached only by the statutory action of ejectment.⁹ And such statutory right of action to recover unassigned dower is vested solely in the widow, and is not available to her assignee.¹⁰ Upon allotment of dower to the widow, in lands claimed by and in possession of a third party by alleged paramount title, the remedy of the dowress to assert her right and recover possession is by ejectment, and if the widow be in possession, the claimant's redress is by like remedy.¹¹

1 2 Scribner on Dower, 2d ed., 34; Pringle v. Gaw, 5 Serg. & R. 536; Jackson v. Vanderheyden, 17 Johns. 167, 8 Am. Dec. 378.

2 King v. Merritt, 67 Mich. 194, 216; and see Inhabitants etc. v. Wilmarth, 13 Met. 414.

3 Howe v. McGivern, 25 Wis. 525.

4 Bratton v. Mitchell, 7 Watts, 113; Pringle v. Gaw, 5 Serg. & R. 536; Gourley v. Kinley, 66 Pa. St. 270

5 Gourley v. Kinley, 66 Pa. St. 270.

6 Yates v. Paddock, 10 Wend. 528; Galbraith v. Fleming, 60 Mich. 408.

7 *Ellicott v. Mosier*, 7 N. Y. 201; and see *Sherwood v. Vanderburgh*, 2 Hill, 306; *Connolly v. Newton*, 85 Hun, 552.

8 *Shaver v. M'Graw*, 12 Wend. 558

9 *Proctor v. Bigelow*, 38 Mich. 282.

10 *Galbraith v. Fleming*, 60 Mich. 408. See *King v. Merritt*, 67 Mich. 194.

11 *James v. Rowan*, 6 Smedes & M. 402; *Pickens v. Wilson*, 13 Smedes & M. 691.

§ 598. Partition.

The widow of an intestate, who was tenant in common, may maintain a writ of dower, as at common law, but she cannot maintain an action of partition in the common-law courts against the cotenant of the intestate. She can have no remedy by an action of partition, wherein the proceeding is according to the course of the common law.¹ Under Massachusetts General Statutes, chapter 90, section 15, the widow of an intestate, without issue, is seised of an undivided half of his real estate for life, as tenant in common with his heirs, and she may petition for partition under chapter 136 of the General Statutes.² A dower interest will not be set off or admeasured in a partition suit under the New York statute relating to partition.³ In Iowa, dower may be assigned in an action in partition.⁴

1 *Brown v. Adams*, 2 Whart. 188.

2 *Sears v. Sears*, 121 Mass. 267. See *Watson v. Watson*, 150 Mass. 84.

3 *Tanner v. Niles*, 1 Barb. 560.

4 *Thomas v. Thomas*, 73 Iowa, 657.

§ 599. Demand.

At common law, a demand of dower is not necessary to warrant an action or proceeding for its recovery.¹ But a demand is generally made before action, since, until demand is made, no damages for detention are recoverable.² In some of the states it is required by statute that a demand of dower be first made in order to maintain an action for its recovery.³ No particular form of demand is required, nor is it essential that it be made in writing, unless the statute so provides.⁴ But it must be shown that in some form a demand or request was made on the party who held the land that he should do a precise and defined thing, namely, set out to the demandant her dower in certain lands sufficiently described.⁵ The demand is not made to complete a title already perfect, but to notify the tenant of the claim made upon him, and to give him an opportunity to investigate it, and assign dower without suit, if he chooses. And it is held to be sufficient if it apprises the tenant with reasonable certainty of the claim that is made.⁶ It need not contain a statement of the legal measure of the dower, and is not vitiated by the fact that such measure is incorrectly stated in it.⁷ Where the statute does not require that any time for setting off the dower should be stated in the demand, the mention therein of a particular time is merely sur-

plusage and does not vitiate.⁸ And a demand of dower may be signed by the widow's attorney. If she claims the benefit of such demand by bringing her action upon it, this is competent proof of the attorney's authority.⁹ Dower need not be demanded on the land in which it is claimed, unless so required by statute.¹⁰ Nor need the demand be made by the widow personally, nor in the presence of witnesses. An agent may make the demand, authorized thereto by parol.¹¹ Demand must ordinarily be made upon, and the action be against, the tenant of the freehold of the interest in which dower is claimed.¹² If, however, there is more than one person seised of the freehold, a demand must be made on each of them.¹³ In states where the guardian of a minor has authority to assign dower, a demand upon the guardian is sufficient.¹⁴ But in Illinois neither a minor nor his guardian has power to assign dower,¹⁵ and hence a demand upon the guardian for dower is of no legal effect.¹⁶

1 See *Jackson v. Churchill*, 7 Cow. 287, 17 Am. Dec. 514; *Conover v. Wright*, 6 N. J. Eq. 613, 617, 47 Am. Dec. 213.

2 *Ellis v. Ellis*, 4 R. I. 110; *Sill v. Sill*, 185 Ill. 594, 608; and see *Rankin v. Oliphant*, 9 Mo. 239, 243; *Layton v. Butler*, 4 Harr. (Del.) 507.

3 See *Ellis v. Ellis*, 4 R. I. 110; *Merrill v. Shattuck*, 55 Me. 370.

4 *Page v. Page*, 6 Cush. 196; *Lothrop v. Foster*, 51 Me. 367.

5 Merrill v. Shattuck, 55 Me. 370; Ford v. Erskine, 45 Me. 484; Atwood v. Atwood, 22 Pick. 283; Fulton v. Fulton, 19 N. H. 168.

6 Haynes v. Powers, 22 N. H. 590; Davis v. Walker, 42 N. H. 482.

7 Davis v. Walker, 42 N. H. 482; Williams v. Williams, 78 Me. 82.

8 Stevens v. Reed, 37 N. H. 49.

9 Stevens v. Reed, 37 N. H. 49.

10 Baker v. Baker, 4 Me. 67.

11 Lothrop v. Foster, 51 Me. 367.

12 Cook v. Walker, 70 Me. 232; Williams v. Williams, 78 Me. 82.

13 Burbank v. Day, 12 Met. 557.

14 See Jones v. Brewer, 1 Pick. 313; Young v. Tarbell, 37 Me. 509.

15 Bonner v. Peterson, 44 Ill. 253; Heisen v. Heisen, 145 Ill. 658.

16 Strawn v. Strawn, 50 Ill. 256; Sill v. Sill, 185 Ill. 504.

§ 600. Parties.

The right of dower, until it is legally and duly assigned, is a right resting in action only. It is a mere right of action, and nothing more.¹ And the general rule at common law is, that it cannot be aliened so as to enable the grantee to bring an action therefor in his own name.² But it is held in some of the states that if a widow sell her right of dower before assignment, the purchaser may maintain a writ of dower, and compel an assignment, in a suit in her name, although it is really for his benefit.³ It has likewise been held that a court of equity will enforce such a conveyance made before assignment, in a proceeding by

the purchaser against the heirs and the widow, the assignee or grantee being considered as succeeding to the widow's rights in the premises.⁴ And under codes of procedure providing that the assignee of a chose in action can bring an action thereon in his own name, the assignee of a widow's dower right may institute a suit in his own name to have the dower set off.⁵ In an action at law for the assignment of dower, the owner of the land or the tenant of the freehold is the only necessary party defendant.⁶ A writ of dower will not lie against a person holding a mere chattel interest in the land, or having an estate of less duration than the life of the dowress.⁷ And the reason of the rule is stated to be, that as the object of an action of dower is to obtain or compel an assignment of dower by the heir or owner, it can only be maintained against the owner or tenant of the freehold, for no other person can assign dower.⁸ By statutory provision in some jurisdictions an action for dower must be brought against the actual occupant of the land.⁹ And it was held under the New York statute that, where the premises in which dower is claimed are in the actual occupation of a tenant for years, the action of ejectment for dower, if maintainable at all, must be brought against the actual occupant and not against the tenant of the freehold.¹⁰ On a bill in equity for the

recovery of dower, all adverse claimants may be made parties defendant.¹¹ Trustees who hold the legal estate for a life, and then to divide among heirs at law, are proper parties defendant.¹² If a widow transfers her right of dower before it has been allotted to her, she is a necessary party defendant in an action by the assignee to have the dower set apart. Such a conveyance will be treated in equity as a contract to have it allotted to her, and then convey it to the purchaser.¹³ Where the land is owned by a married woman whose husband has an interest therein as tenant by the curtesy or otherwise, the husband is a necessary party defendant.¹⁴ If the land has been divided, by partition, between several different parties, the dowress may properly proceed against the owner of each portion.¹⁵ Or she may, in such case, proceed against all in one suit, though not compelled to do so.¹⁶ In New Jersey, when a husband, in his lifetime, has divided his land into several parcels, and aliened those parcels to different purchasers, only those interested in one such parcel are properly joined as parties defendant to the assignment of dower in that parcel.¹⁷ Where lands are sold as one tract under an execution against the husband during his life, in a suit by the widow to recover dower in the lands, persons owning different parts thereof in severalty may be properly joined as parties

defendant.¹⁸ In equitable proceedings for the assignment of dower, the administrator of the deceased husband is not entitled to become a party.¹⁹

1 Rayner v. Lee, 20 Mich. 384; and see vol. 1, sec. 67, ante; also, Virgin v. Virgin, 91 Ill. App. 188.

2 Galbraith v. Fleming, 60 Mich. 408, 412; Jackson v. Aspell, 20 Johns. 411.

3 Thomas v. Simpson, 3 Pa. St. 60; Rowe v. Johnson, 19 Me. 146; Robie v. Flanders, 33 N. H. 524; Lamar v. Scott, 4 Rich. 516; McMahon v. Gray, 150 Mass. 289, 15 Am. St. Rep. 202.

4 See Potter v. Everitt, 7 Ired. Eq. 152; MacCubbin v. Cromwell, 2 Har. & G. 443; Parton v. Allison, 111 N. C. 429; Strong v. Clem, 12 Ind. 37, 74 Am. Dec. 200; Morgan v. Blatchley, 33 W. Va. 155.

5 Strong v. Clem, 12 Ind. 37, 74 Am. Dec. 200; Serry v. Curry, 26 Neb. 353, 363; Payne v. Becker, 87 N. Y. 153; Dobberstein v. Murphy, 64 Minn. 127; and see Mutual L. Ins. Co. v. Shipman, 119 N. Y. 324; Pope v. Mead, 99 N. Y. 201.

6 Seaton v. Jamison, 7 Watts, 533.

7 Galbraith v. Green, 13 Serg. & R. 94.

8 Ellicott v. Mosier, 7 N. Y. 205; Drost v. Hall, 52 N. J. Eq. 68. See Jones v. Patterson, 12 Pa. St. 149.

9 See Ellicott v. Mosier, 7 N. Y. 201; Connolly v. Newton, 85 Hun, 552.

10 Ellicott v. Mosier, 7 N. Y. 201.

11 Badgley v. Bruce, 4 Paige, 98.

12 Droste v. Hall (N. J. Eq.), 29 Atl. Rep. 437.

13 Parton v. Allison, 111 N. C. 429.

14 Morse v. Thorsell, 78 Ill. 600.

15 Allen v. McCoy, 8 Ohio, 418; Coburn v. Herrington, 114 Ill. 104.

16 Coburn v. Herrington, 114 Ill. 104; and see Marshall v. Anderson, 1 B. Mon. 198.

17 Droste v. Hall (N. J. Eq.), 29 Atl. Rep. 437.

18 *Sanders v. Wallace*, 114 Ala. 259. Compare *Hart v. Burch*, 130 Ill. 426.

19 *Kenyon v. Kenyon*, 17 R. I. 539; and see *Campbell v. Murphy*, 2 Jones Eq. 357.

§ 601. Declaration or Complaint.

Following strictly the form of declaration in dower, at common law, it is not necessary to aver either the seisin or possession of the husband, or the deforcement of the demandant and possession of the land by the defendant. These are stated as matters of defense, which may be the subjects of special pleas.¹ But in the modern proceeding at law, unless the declaration alleges a seisin of the husband of an estate of which his widow is by law dowable it is defective, and will be adjudged bad on demurrer.² An allegation that the husband died seised of the land, and that his estate was an estate of inheritance, is sufficient, without further setting forth the nature of the title.³ The marriage, though not otherwise stated than indirectly in the description of the demandant as the widow of the deceased, is held sufficient.⁴ The description of the land in the declaration must be so certain that possession may be delivered by the sheriff without any reference to any description dehors the writ, and any defect of this kind cannot be cured by reference to any deeds or records.⁵ But the description may be sufficient although the metes and bounds of

the land be not given.⁶ In jurisdictions where a demand of dower is required, a demand must be alleged.⁷ A declaration which sets out and claims dower in several separate and distinct parcels of land is not for that reason bad.⁸ In New York, the right to maintain ejectment for dower is given by statute, and the action must be against the actual occupant;⁹ and a complaint in which the dowress alleges, among other things, that her husband had executed a deed of the premises to one of the defendants, and that she had not joined in the conveyance, but which fails to allege that the defendant was either an actual occupant or a person exercising acts of ownership or one claiming a title or interest in the premises at the time of the commencement of the action, is demurrable.¹⁰ In a suit in equity for dower, a bill which alleges that the complainant was the wife of one who was seised of the land, his death, his alienation of the land during the coverture, and of possession, with claim of title, by the defendant, are *prima facie* sufficient to entitle the complainant to a decree. It is not indispensable that her bill should negative every fact which may possibly exist and be inconsistent with her claim.¹¹ The bill must distinctly set forth a seisin of the husband during coverture in such an estate as would entitle the demandant to her dower.¹² The bill should allege a seisin in fee

by the husband. But the allegation that he was possessed in his own right may be understood in a sense entirely equivalent, and the additional words "and by bond" may be understood not as qualifying the right already alleged, but as indicating an additional one, which, though entirely superfluous, should not destroy that which was already sufficient, and the bill will be sustained in the absence of a demurrer.¹³ A bill, instead of charging that the complainant's husband or some other to his use was, at some time during the coverture, seised of an estate of inheritance in the lands out of which dower is claimed, merely charges that the husband "had the use and enjoyment of the same and occupied the same as his homestead," is held to be demurrable.¹⁴ Generally speaking, where the owner of the fee or the tenant whose duty it was to set apart dower has failed to do so, some sort of application stating such facts as are jurisdictional should be made to the proper court, before such court is authorized to take cognizance of the matter. All the facts necessary to give the court jurisdiction must in some manner be made to appear.¹⁵ Among such facts are those of the residence of the widow, that she is a widow, that the estate in which she asks to be endowed is that of her deceased husband, and of which he died seised.¹⁶ Under the Michigan statute, the widow ought further to state

that her right to dower is not disputed by the heirs or devisees, and that she, or some other person interested in the land, wishes it set apart.¹⁷ In Alabama, a petition for dower in the probate court must allege the marriage, the seisin of the husband during coverture, and his death; it must contain a description of the lands in which dower is claimed and aver that they lie in the county where the petition is filed; it must also show whether the deceased died testate or intestate, who are his heirs, who his personal representatives, if any, and who the tenants of the freehold. The record must also show that the necessary parties are before the court.¹⁸

1 Foxworth v. White, 5 Strob. 113.

2 Freeman v. Freeman, 39 Me. 426; Hutchins v. Burrell, 72 Me. 311; Knighton v. Young, 22 Md. 359; Waters v. Gooch, 6 J. J. Marsh. 586, 22 Am. Dec. 108; Garrison v. Young, 135 Mo. 203; and see Stilphen v. Houdlette, 60 Me. 447; Kenyon v. Kenyon, 17 R. I. 539.

3 Lecompte v. Wash, 9 Mo. 551.

4 Foxworth v. White, 5 Strob. 113; contra, Martin v. Martin, 22 Ala. 86. See Draper v. Draper, 11 Hun, 616, as to sufficiency of allegation of the marriage; also, Parton v. Allison, 111 N. C. 429; Fritz v. Tudor, 2 Duvall, 173.

5 Evans v. Evans, 29 Pa. St. 277; Atwood v. Atwood, 22 Pick. 283; Martin v. Martin, 22 Ala. 86; King v. Merritt, 67 Mich. 194. If the description be defective, the complaint should be amended: Peart v. Peart, 18 N. Y. St. Rep. 456.

6 Ayer v. Spring, 10 Mass. 83.

7 Freeman v. Freeman, 39 Me. 426; Hasselman v. Allen, 42 Ind. 257; Wells v. Sprague, 10 Ind. 305.

- 8 *Hutchins v. Burrill*, 72 Me. 311.
- 9 See sec. 596, ante.
- 10 *Connolly v. Newton*, 85 Hun, 552.
- 11 *Wall v. Hill*, 7 Dana, 172.
- 12 *Wing v. Ayer*, 53 Me. 465.
- 13 *Gaston v. Bates*, 4 B. Mon. 366.
- 14 *Kenyon v. Kenyon*, 17 R. I. 539.
- 15 See *Smith v. Smith*, 5 Dana, 179; *Sheafe v. O'Neil*, 9 Mass. 9; *Ryder v. Flanders*, 30 Mich. 342; *Martin v. Martin*, 22 Ala. 86.
- 16 *King v. Merritt*, 67 Mich. 194; and see cases cited above.
- 17 *King v. Merritt*, 67 Mich. 194.
- 18 *Martin v. Martin*, 22 Ala. 86; and see, also, *Forrester v. Forrester*, 38 Ala. 119.

§ 602. Pleas—Answer and Defenses.

Tenants in severalty of distinct parcels of land cannot be joined in a writ of dower, and several tenancy may be pleaded in abatement.¹ In England, according to the early authorities, non-tenure was pleadable in abatement only.² But it has been held by the American courts that non-tenure and disclaimer may also be pleaded in bar.³ But a brief statement of non-tenure cannot avail, unless filed within the time allowed for pleas of abatement, or by special leave of the court.⁴ The objection that it does not appear that the defendant was tenant of the freehold when the action was commenced can be taken advantage of only by plea in abatement.⁵ A plea that the husband of the demandant was an alien is clearly pleadable in abatement.⁶ If dower is

assigned to a widow to her satisfaction before any suit brought, she has no longer any cause of action, and her suit must be barred by a plea showing that fact. Such assignment and acceptance is a bar, if properly pleaded, of any further prosecution of an action of dower in any stage of it.⁷ But such plea will be insufficient, if it is not alleged that the widow entered and agreed to the assignment, or that she accepted it, or that it was made to her satisfaction, or substantially to that effect.⁸ It has been generally held that a valid divorce from the bond of matrimony, for the fault of either party, bars the wife's right of dower, unless expressly or impliedly preserved by statute.⁹ In a number of the states the right is so preserved, and, if the divorce be decreed in consequence of the aggression of the husband, the wife is not barred of her right of dower, but, upon the death of her husband, may enforce that right in the same manner she might have done had she continued to live with him until the day of his death.¹⁰ In Kentucky, the statute makes no exception, and a divorce bars all claim of the wife to dower, as well in land conveyed by the husband during the existence of the marital relation as in that of which he may die possessed.¹¹ It is not a bar to the action for dower that the defendant is a bona fide purchaser for value without notice.¹² The plea of purchaser for valuable con-

sideration without notice is equitable in its character, and has no proper application to a claim purely legal like that of dower.¹³ A plea that the husband alienated the lands in his lifetime, and that the defendant made great and valuable improvements thereon, was held to be bad.¹⁴ Nor is the widow barred of her dower by the fact that the husband owed debts at the date of his deed or time of his death, unless the claims of the creditors be properly enforced. A third person cannot set up the debt as a bar to the action for dower.¹⁵ A defendant in a suit in equity for dower may set up any number of defenses, if consistent with each other. And where inconsistent defenses are interposed, and no exception is taken on that account, and on the hearing one is found to be untrue and the other established, the decree will not be reversed on account of such untrue and inconsistent defense.¹⁶ Where the widow assigns her right of dower before admeasurement, for a valuable consideration, and there is no proof of fraud, imposition, or undue advantage, a court of equity will protect the rights of the alienee or of those claiming under him, against a subsequent suit for dower, and the fact that the entire purchase money has not been paid does not defeat the defense. And this is so although such assignment is void and inoperative at law.¹⁷ An agreement entered into by the hus-

band and wife and a trustee for the latter, that, in consideration of her enjoying separately and absolutely controlling her separate property, she would relinquish her dower in her husband's lands, will not be effective as an equitable bar to her right of election to take dower in lieu of the interest given to her by her husband's will.¹⁸ In an action for dower, if the tenant would excuse himself from damages, he must plead failure to make a demand for dower (*tout temps prist*), and, unless he so pleads, he cannot take advantage of the laches of the widow in not demanding her dower.¹⁹ Under the New Jersey statute, it is held that "*tout temps prist*" is not a good plea in dower in bar of damages for the detention of dower in lands of which the husband died seised.²⁰ The pleas "*tout temps prist*" and "*ne unques accouple*" may be pleaded together.²¹

1 Fosdick v. Gooding, 1 Me. 30, 10 Am. Dec. 25.

2 See Keith v. Swan, 11 Mass. 216; Seaton v. Jamison, 7 Watts, 533, 540; Manning v. Laboree, 33 Me. 343.

3 Fosdick v. Gooding, 1 Me. 30, 10 Am. Dec. 25; Otis v. Warren, 14 Mass. 239; Prescott v. Hutchinson, 13 Mass. 440; Merritt v. Russell, 1 Mass. 469; Caspoons v. Jones, 7 Pa. St. 120.

4 Young v. Tarbell, 37 Me. 509.

5 Lewis v. Meserve, 61 Me. 374.

6 Sewall v. Lee, 9 Mass. 363; Coxe v. Gulick, 10 N. J. L. 328.

7 Clark v. Muzzey, 43 N. H. 59.

8 Johnson v. Morse, 2 N. H. 48; Clark v. Muzzey, 43 N. H. 59; and see White v. White, 16 N. J. L. 202, 31 Am. Dec. 232.

9 See Hood v. Hood, 110 Mass. 463; Lamkin v. Knapp, 20 Ohio St. 454; Marvin v. Marvin, 59 Iowa, 699; Gleason v. Emerson, 51 N. H. 405; Wood v. Wood, 59 Ark. 441, 43 Am. St. Rep. 42; Price v. Price, 124 N. Y. 599; Barrett v. Failing, 111 U. S. 523; Frampton v. Stephens, L. R. 21 Ch. Div. 164; also, vol. 1, sec. 58.

10 See Mansfield v. McIntyre, 10 Ohio, 27; McGill v. Deming, 44 Ohio St. 645; Davol v. Howland, 14 Mass. 219; Moulton v. Moulton, 76 Me. 85; Gordon v. Dickison, 131 Ill. 141; vol. 1, secs. 58, 59.

11 McKean v. Brown, 83 Ky. 208.

12 Reel v. Elder, 62 Pa. St. 308, 1 Am. Rep. 414; Mitchell v. Farrish, 69 Md. 235.

13 McMorris v. Webb, 17 S. C. 563, 43 Am. Rep. 629; Sondley v. Caldwell, 28 S. C. 580.

14 Coxe v. Higbee, 11 N. J. L. 395.

15 Thomas v. Hesse, 34 Mo. 13, 84 Am. Dec. 66.

16 Scanlan v. Scanlan, 134 Ill. 630.

17 Wilkinson v. Brandon, 92 Ala. 530; Reeves v. Brooks, 80 Ala. 26.

18 McCaulley v. McCaulley, 7 Houst. 102.

19 Humphrey v. Phinney, 2 Johns. 484; Hitchcock v. Harrington, 6 Johns. 290, 296, 5 Am. Dec. 229.

20 Hopper v. Hopper, 22 N. J. L. 715; and see, also, Rankin v. Oliphant, 9 Mo. 239.

21 Allan v. Smith, 1 Cow. 180.

§ 603. Same—Statute of Limitations.

A writ of dower is held not to be within the statute of limitations.¹ General statutes of limitation do not apply to or bar the dower right.² No right of action to recover dower accrues to the wife until the death of the husband, and the statute of limitations does not begin to run against her right to claim dower until then.³

No adverse occupation of the premises in which dower is claimed, however long continued during the life of the husband, can affect the wife's right to recover dower after his decease.⁴ In some jurisdictions the matter of barring the recovery of dower by lapse of time is controlled by express statutory provisions. In West Virginia, the statutory bar to a widow's remedies for the recovery of her dower is the lapse of ten years from the death of her husband, when her right to sue accrues.⁵ The action for dower in Missouri is one for the recovery of real estate, and the statute governing the limitation of such actions applies to it.⁶ Under that statute there is no bar unless there has been an adverse possession of the land by the defendant or those under whom he claims for ten years. The right of dower must have been extinguished by an adverse possession.⁷ In Alabama, adverse possession of land for any period less than twenty years, except as to an alienee of the husband, after the accrual of the right to dower, does not bar the widow's suit therefor, and such possession must be open, notorious, uninterrupted, and continuous.⁸ Under the Illinois statute of limitations, the widow's dower may be barred as against a stranger or purchaser, who has been in the possession of the premises for seven years, and has paid the taxes thereon, as required by the stat-

ute.⁹ But an heir cannot set up the statute of limitations against the dower right, since it is his duty to assign dower, and for that reason his possession is not regarded as adverse to the owner of the dower estate. It is only as against strangers, or a purchaser either from the deceased owner of the fee, or from his heir or heirs, that the statute can be pleaded as a defense to the enforcement of a dower right.¹⁰ Under the Maine statute the widow cannot commence an action to recover her dower until, after demanding her dower, she has given the tenant a month's opportunity to set it out to her without an action, which he failed to improve. And her action is not barred by the statute of limitations until twenty years and one month after demand made.¹¹ In Maryland, the statute of limitations does not apply in equity to a widow's claim of dower.¹² It was, however, held that lapse of time and laches may be a bar to a suit for the enforcement of dower.¹³ But laches is not a bar to a bill for dower filed four years and five months after the death of the plaintiff's husband.¹⁴ In England, a widow's right to sue in equity for dower will be barred, where she has not for upward of thirty years taken any proceedings, either at law or in equity, to have it assigned to her.¹⁵ Staleness of demand was held to be no

defense to an action for admeasurement of dower in Missouri.¹⁶

1 *Barnard v. Edwards*, 4 N. H. 107, 17 Am. Dec. 403; *Bordly v. Clayton*, 5 Harr. (Del.) 154. But see contra, *Phares v. Walters*, 6 Iowa, 106; *Conover v. Wright*, 6 N. J. Eq. 613, 47 Am. Dec. 213.

2 *Parker v. Obear*, 7 Met. 24; *Littleton v. Patterson*, 32 Mo. 357; *Hogle v. Stewart*, 8 Johns. 104; *Hitchcock v. Harrington*, 6 Johns. 290, 5 Am. Dec. 229; *Burt v. Cook Sheep Co.*, 10 Mont. 571; *Lynde v. Wakefield*, 19 Mont. 23; *Smith v. King*, 50 Ga. 192. See secs. 65f, 71, ante.

3 *Durham v. Angier*, 20 Me. 242; *Steele v. Gellatly*, 41 Ill. 39; *Hart v. McCollum*, 28 Ga. 478; *Anderson v. Sterritt*, 79 Ky. 499; *Brown v. Morisey*, 126 N. C. 772; *Winters v. De Turk*, 133 Pa. St. 359; *Thompson v. McCorkle*, 136 Ind. 484, 43 Am. St. Rep. 334; *Stidham v. Matthews*, 29 Ark. 650. See *Long v. Stock-Yards Co.*, 107 Mo. 298, 28 Am. St. Rep. 413.

4 *Williams v. Williams*, 89 Ky. 381. See *Elyton Land Co. v. Denny*, 108 Ala. 553; *Boyd v. Harrison*, 36 Ala. 533; *Barksdale v. Garrett*, 64 Ala. 277, 38 Am. Rep. 6.

5 *Smith v. Wehrle*, 41 W. Va. 270. In Kentucky, suit is barred within fifteen years after death of husband: *Anderson v. Sterritt*, 79 Ky. 499.

6 *Sherwood v. Baker*, 105 Mo. 478, 24 Am. St. Rep. 399; *Beard v. Hale*, 95 Mo. 16.

7 *Sherwood v. Baker*, 105 Mo. 478, 24 Am. St. Rep. 399; *Null v. Howell*, 111 Mo. 273; and see *Anderson v. Sterritt*, 79 Ky. 499; *Kent v. Taggart*, 68 Ind. 163; *Carey v. West*, 139 Mo. 146; *Westmeyer v. Gallenkamp*, 154 Mo. 28, 77 Am. St. Rep. 747; *Felch v. Finch*, 52 Iowa, 563; *Whiting v. Nicoll*, 46 Ill. 230, 92 Am. Dec. 248.

8 *Elyton Land Co. v. Denny*, 96 Ala. 337; 108 Ala. 553; *Barksdale v. Garrett*, 64 Ala. 277, 38 Am. Rep. 6.

9 *Miller v. Pence*, 132 Ill. 149; *Hart v. Randolph*, 142 Ill. 521.

10 *Sill v. Sill*, 185 Ill. 594; *Downs v. Allen*, 10 Lea, 652; and see *Danley v. Danley*, 22 Ark. 263; *Livingston v. Cochran*, 33 Ark. 294; *O'Gara v. Neylon*, 161 Mass. 140; *Winters v. De Turk*, 133 Pa. St. 359.

11 Chase v. Alley, 82 Me. 234; and see, also, Robie v. Flanders, 33 N. H. 524.

12 Mitchell v. Farrish, 69 Md. 235; and see, Appeal of Merrill, 16 Week. Not. Cas. 491.

13 Steiger v. Hillen, 5 Gill & J. 121. In Alabama a delay of twenty years will defeat the claim for dower in equity: Barksdale v. Garrett, 64 Ala. 277, 38 Am. Rep. 6. See sec. 65f, ante.

14 Mitchell v. Farrish, 69 Md. 235.

15 Marshall v. Smith, 34 L. J. Ch. 189; 10 Jur., N. S., 1174; 13 W. Rep. 198.

16 Johns v. Fenton, 88 Mo. 64. See, also, Larrowe v. Beam, 10 Ohio, 498; Ridgway v. McAlpine, 31 Ala. 458.

§ 604. Evidence.

A widow suing for dower is not held to a strict proof of her husband's title, since she is not the keeper of his title papers. And proof of the possession of the husband under claim of title during the marriage, and proof of the possession of the defendant under the husband when suit is brought, are prima facie sufficient evidence of the husband's seisin and of the widow's right to dower upon the death of the husband.¹ And a clear and complete case is made out in a suit by a widow for dower, by proof of the marriage, death of the husband, title in the husband to the land in question during the marriage, possession of the husband under that title, his subsequent conveyance of the premises in which she did not join, the acquisition of this title by the defendant, and his possession thereunder at the time of the suit.²

In ejectment for dower, the same evidence of seisin which would entitle the heir to recover in ejectment will sustain the action for dower. Actual possession of the husband, or his receipt of rent, is *prima facie* evidence of seisin, in such action.³ The plaintiff in an action of ejectment for dower may show at what time a deed from her husband, under which the defendant claims title, was delivered.⁴ In such action it is also competent for the defendant to prove the declarations of the grantor, made after his marriage to the plaintiff, to the effect that such deed was delivered before he married the plaintiff.⁵ It is held that the admissions of the husband whilst living are as competent evidence in bar of the title of his widow, suing in ejectment for her dower, as they would be in bar of the title of his heir or grantee.⁶ The plaintiff in an action for dower could not produce record evidence of her husband's title, for the reason that such record had been destroyed by fire, nor could she prove directly by any witness that there ever was in existence any documentary evidence on the subject; and it was held that, in such case, it was competent to show by parol that her husband did have an estate of fee simple in the land, and that such parol evidence was sufficient to entitle the plaintiff to recover.⁷ In North Carolina, it is incumbent on the widow, in her petition for

dower, to show by proper evidence seisin in the husband during coverture, and summons served on the heirs.⁸ Possession of the husband and not the residence of the wife determines her right to quarantine in the mansion house and plantation of her deceased husband, and testimony offered to show that after separating from her husband the wife established her residence in another state is properly excluded.⁹ Where, in an action for the admeasurement of dower, issue is raised as to the marriage of the plaintiff, the defendant is entitled to a bill of particulars, showing whether the alleged marriage was ceremonial, and, if so, when, where, and by whom performed, and if nonceremonial, when and where it was contracted.¹⁰ It seems, however, that he is not entitled to be furnished with the names of the witnesses present at the marriage.¹¹ If a demand for dower is alleged in the writ, and is not denied, the demandant need not prove it.¹² Possession by the husband, unless impeached or explained, is held to be conclusive evidence of title.¹³ Such possession is evidence of seisin unless the tenant shows a paramount title in himself.¹⁴ The fact that one has had possession of land under claim of ownership, and has used it for several years, and finally sells and conveys it, affords sufficient evidence of seisin to entitle his widow to recover dower therein.¹⁵ Positive proof

of a personal demand for dower is not always attainable, and such demand may be proved by the admissions of the party of whom demand was made, or it may be inferred from facts and circumstances proved.¹⁶ The testimony of the demandant in a writ of dower is competent to prove her husband's death.¹⁷ But it is held that in ejectment for dower, the letters of administration are not evidence, as against a stranger, to prove the death of the husband.¹⁸ The tables showing the probabilities of life, by which the value of dower rights can be computed, are recognized by the courts as the proper means of proving such value.¹⁹

1 Gentry v. Garth, 10 Mo. 227; Cazier v. Hinchey, 143 Mo. 203; Bancroft v. White, 1 Caines, 190; Embree v. Ellis, 2 Johns. 123; Jackson v. Waltermire, 5 Cow. 299; Reich v. Berdd, 120 Ill. 499; Stark v. Hopson, 22 S. C. 42; 30 S. C. 370.

2 Cazier v. Hinchey, 143 Mo. 203; and see Chapman v. Schroeder, 10 Ga. 321.

3 Jackson v. Waltermire, 5 Cow. 299; Carpenter v. Weeks, 2 Hill, 341; and so, to same effect, Gordon v. Dickison, 131 Ill. 141.

4 Keator v. Dimmick, 46 Barb. 158; and see Van Valen v. Schemerhorn, 22 How. Pr. 416.

5 Keator v. Dimmick, 46 Barb. 158.

6 Van Duyne v. Thayre, 14 Wend. 233.

7 Beaven v. Lancaster (Ky. Ct. App.), 21 S. W. Rep. 243.

8 Waters v. Waters, 125 N. C. 590.

9 King v. King, 155 Mo. 406.

10 Govin v. De Miranda, 33 N. Y. Supp. 753; 67 N. Y. St. Rep. 426; 87 Hun, 227.

11 Govin v. De Miranda, 33 N. Y. Supp. 753; 67 N. Y. St. Rep. 426; 87 Hun, 227. See, as to proof of marriage, Jones v. Jones, 28 Ark. 19; Nichols v. Munsel, 115 Mass. 567; Smith v. Smith, 52 N. J. L. 207.

12 Ayer v. Spring, 10 Mass. 80.

13 Stevens v. Reed, 37 N. H. 49.

14 Mann v. Edson, 39 Me. 25; Reid v. Stevenson, 3 Rich. 66.

15 Gordon v. Dickison, 131 Ill. 141; and see Wall v. Hill, 7 Dana, 172; Gilman v. Sheets, 78 Iowa, 499.

16 Luce v. Stubbs, 35 Me. 92.

17 Flynn v. Coffee, 12 Allen, 133.

18 Weiskoph v. Dibble, 18 Fla. 24. See sec. 57, ante.

19 McHenry v. Yokum, 27 Ill. 160.

§ 605. Trial and Verdict.

Issues of fact in an action for dower must be tried by jury unless the right is waived. And in an equitable action for the recovery of dower, the defense was that the plaintiff had, by an antenuptial agreement, released her claim to dower, and it was held that the defendants were entitled to a trial by jury.¹ In Missouri, a suit for dower is an action at law in which the parties are entitled to a jury to pass upon the questions of fact. They may, however, waive this right and submit the questions of fact to the court, in which case the court acts in a dual capacity. As a jury, he weighs the evidence and renders a verdict upon the facts, and as a judge he declares the law upon the facts as found.² In some cases of dower in chancery, the issues may be submitted to a jury, and in other cases an action should be directed

to be brought at law. Such a step, it is held, would be in accordance with the course of a court of chancery, but the facts being found, or the right established in these cases in favor of the complainant, the court should give complete relief by assigning the dower, and taking all proper accounts between the parties.³ If the title of the complainant is denied, the court will retain the bill and direct a suit at law to try the title, and will then give possession and decree such other relief as the plaintiff may be entitled to on the rights thus established.⁴ The finding of the jury does not preclude the court from calculating and ascertaining for itself the true amount of damages.⁵ And where to a bill for dower and account of arrears, the defendant answered admitting the husband's seisin, his death, the possession of his family since his death, and alleged the offer of the defendant to give the complainant one-third of the income derived from the whole estate, or pay her the valuation thereof, and did not deny the marriage, it was held that a court of equity had jurisdiction to proceed with the cause, without a trial at law.⁶ In suits for dower, courts of equity govern themselves in the decision of cases involving no equitable right by precisely the same principles that would govern a court of law in deciding a like case.⁷ On the trial of the issues in an action for dower, the plain-

tiff has the right, as in other cases, to open and conclude.⁸ The verdict in the action may be either general or special. The former pronounces generally upon the issues in favor of one party or the other, while the latter finds the facts only, leaving the judgment to the court.⁹ If the verdict is informal or defective, it may be amended.¹⁰ In an action for dower some of the defendants admitted the marriage and the death of the testator, and denied all the other allegations of the complaint, while others, in addition thereto, averred ownership in themselves, severally, of the premises in which the dower was claimed. The principal dispute on the trial was as to the ownership of the premises by the testator during the marriage, and the only question submitted to the jury was, whether certain deeds, in which the testator was grantee, were delivered to him unconditionally, and to this the jury answered, "yes." It was held that this was neither a general nor a special verdict, and as it did not, taken in connection with the facts admitted by the pleading, establish that the plaintiff was entitled to dower, it should be set aside.¹¹ If the jury find that the husband of the plaintiff did not die seised, and find the annual value of the premises at the time of alienation, the latter part of the finding will be regarded as surplusage, or rejected altogether, and will not vitiate the verdict.¹² If the jury find

that the husband died seised, they must also find the time when he so died, of what estate, the annual value of the land, and damages, with costs. But if the husband did not die seised, then no damages nor costs, but only the value of the land.¹³ A verdict in favor of one of several defendants upon his separate plea will not avail another defendant, against whom a judgment by default has been rendered.¹⁴

1 Kinne v. Kinne, 2 Thomp. & C. 393.

2 Shipp v. Snyder, 121 Mo. 155.

3 Loudon v. Loudon, 1 Humph. 1, 13. And see Swaine v. Perine, 5 Johns. Ch. 482, 9 Am. Dec. 382; Mundy v. Mundy, 2 Ves. Jr. 128; Curtis v. Curtis, 2 Brown Ch. 633.

4 Badgley v. Bruce, 4 Paige, 100; and see Ocean Beach Assn. v. Brinley, 34 N. J. Eq. 439; Wells v. Beall, 2 Gill & J. 468; Rockwell v. Morgan, 13 N. J. Eq. 384.

5 Loudon v. Loudon, 1 Humph. 1.

6 Scott v. Crawford, 11 Gill & J. 365.

7 Drost v. Hall, 52 N. J. Eq. 68.

8 Kendrick v. Ravens, 47 Ga. 612.

9 Shipp v. Snyder, 121 Mo. 155.

10 Bear v. Snyder, 11 Wend. 592.

11 Vadney v. Thompson, 44 Hun, 1.

12 Shirtz v. Shirtz, 5 Watts, 255; Leineweaver v. Stoeper, 17 Serg. & R. 297; Benner v. Evans, 3 Penr. & W. 454.

13 Martin v. Martin, 14 N. J. L. 125.

14 Lecompte v. Wash, 9 Mo. 551.

§ 606. Judgment—Decree.

The judgment in the common-law action for dower, generally speaking, is to recover seisin of a third part of the tenements in demand in sever-

alty, by metes and bounds, and the mesne profits and damages.¹ When the widow proceeds by action for the recovery of her dower, it is conclusive upon all parties who have been brought in, and if all the parties necessary to a complete determination are present, the judgment is absolute.² An assignment of dower made by commissioners, under an order of court, at the instance of one of the heirs, is binding on the widow, if it be a full and just assignment, and also on the coheirs, even if infants, provided the assignment be not excessive.³ If the assignment be excessive, a court of equity has power to set it aside.⁴ A judgment of the probate court confirming the action of commissioners in assigning dower in lands not included in the petition praying for the assignment was held to be void, as being aside from the issue presented;⁵ the court must act upon the property according to the rights that appear upon the record.⁶ Where a judgment provides for an assignment of dower, it is not necessary in every case to assign by metes and bounds.⁷ And under the New York statute (Code Civ. Proc., c. 14, tit. 1, art. 3) regulating proceedings in actions for dower, a widow is entitled to a judgment assigning dower to her in the undivided interest in lands owned by her husband as tenant in common, or for a sale of his interest.⁸ A decree in favor of a demandant for

dower, that she is entitled thereto as claimed, and appointing commissioners to admeasure it, ascertain the intermediate rents and profits, and report thereon to the court at the next term, is not a final, but only an interlocutory, decree, which is still within the control of the court, and may be set aside at a subsequent term.⁹ In proceedings for dower before the probate court, the petition should state who are the heirs, and designate those who are infants, or femmes covert, but it is not indispensable that the decree should show that the facts were proved as alleged. It is sufficient if the decree recites the facts upon which the petitioner's right depends.¹⁰ A decree which awards to the widow the possession of the premises set off by the commissioners as her dower, when properly passed and recorded, is valid, though not signed by the judge.¹¹ But a decree for dower which failed to determine by whom the mesne profits were to be paid was held to be defective in that regard. One only of the defendants having had possession of the premises, they should have been adjudged against him alone.¹² After final judgment in an action for dower it cannot be subsequently altered by an order of court as to the sum fixed therein.¹³ But an error of the clerk of the court in entering up a judgment for dower, in failing to enter the judgment of seisin, was held to be amendable after

the term, though it would be otherwise as respects a wrong judgment pronounced by the court.¹⁴ In Rhode Island, a decree assigning dower by metes and bounds, where all persons interested have waived their right to appeal in writing, becomes final upon its entry.¹⁵ The report of commissioners to assign dower, and the action of the court in confirming their report, though entitled to much consideration, are not conclusive, and, if they clearly depart from the rule that dower should be so assigned that the widow may enjoy one-third of the income arising from the estate, the decree confirming the report will be reversed, and the report set aside.¹⁶

1 Park on Dower, 298; Scribner on Dower, 2d ed., 105; *Dennis v. Dennis*, 2 Saund. 328, 331; *Benner v. Evans*, 3 Penr. & W. 454. See sec. 71, ante.

2 *Dwyer v. Dwyer*, 13 Abb. Pr., N. S., 269, 270. See *Fussell v. Short*, 96 Ga. 524.

3 *Moore v. Waller*, 2 Rand. 418.

4 *Pierson v. Hitchner*, 25 N. J. Eq. 129.

5 *Falls v. Wright*, 55 Ark. 562, 29 Am. St. Rep. 74.

6 *Falls v. Wright*, 55 Ark. 562, 29 Am. St. Rep. 74; *Munday v. Vail*, 34 N. J. L. 420; *Reynolds v. Stockton*, 43 N. J. Eq. 211, 3 Am. St. Rep. 305; *Corwithe v. Griffing*, 21 Barb. 9; *Giffard v. Hort*, 1 Schoales & L. 408.

7 *Van Gelder v. Post*, 2 Edw. Ch. 577; *In re Chase*, 1 Bland, 206, 17 Am. Dec. 277; and see sec. 69, ante.

8 *Card v. Pudney*, 59 N. Y. Supp. 278, 42 N. Y. App. Div. 405. See, also, *Blossom v. Blossom*, 9 Allen, 254; *Hart v. Burch*, 130 Ill. 427; *Heisen v. Heisen*, 145 Ill. 658.

9 *Ex parte Crittenden*, 10 Ark. 333.

10 Forrester v. Forrester, 39 Ala. 320. See Martin v. Martin, 22 Ala. 86.

11 Agnew v. Lichten, 10 Ill. App. 79; Dunning v. Dunning, 37 Ill. 306.

12 Reeves v. Reeves, 54 Ill. 332. Insufficient description of the lands in a decree for dower: See Meyer v. Pfeiffer, 50 Ill. 485.

13 McIntyre v. Clark, 43 Hun, 352.

14 Dewey v. Teneyck, 3 N. J. L. *1023 (576).

15 Hammond v. Hammond, 19 R. I. 400.

16 Fuller v. Conrad, 94 Va. 233.

§ 607. Abatement and Revivor.

At common law, an action for dower abates on the death of the dowress pending suit,¹ and there can be no substitution of her personal representatives for any purpose.² If the demandant dies before the judgment of seisin is executed, her right to an estate in dower is determined, and if she dies before the damages are assessed her right to damages is gone.³ A plea that the demandant died before her suit was commenced is, in substance, a plea that the demandant's estate was determined before suit. It is a complete defense to the plaintiff's cause of action and is, in substance, a plea in bar.⁴ The reason given for the rule at law that if the widow dies before her damages are assessed her personal representative cannot claim any is, that damages can only be given for the detention of the possession, and in writs of right, where the right itself is disputed, no damages are given, because no wrong is done un-

til the right is determined.⁵ But it is held that a different and more liberal rule prevails in equity, and if the widow dies pending a bill in equity for dower, her death does not deprive her personal representative of the arrears of dower, but he may revive the suit and recover mesne profits.⁶ Under the Montana statute (Code Civ. Proc., sec. 22), an action to recover a dower right and for the value of rents and profits does not abate upon the death of the plaintiff, but survives to her legal representatives.⁷ And so under the Kentucky statute.⁸ Where a widow, having obtained a decree for dower, died pending an appeal therefrom, it was held that her administrator was entitled to an account from the defendant for rents and profits.⁹ So it was held that the death of the widow, after the oral announcement of the decision of the court in her favor, in her action to recover a gross sum in lieu of dower, would not abate the action nor alter the rights of the parties, and that the court would order findings to be signed and judgment entered in accordance with the oral decision at the trial.¹⁰ But a memorandum made by a judge, unsigned, and merely determining how an order confirming a referee's report fixing the value of the plaintiff's dower right, after the rendition of a verdict declaring her entitled to dower, should be framed for entry, is not such a final judgment as will

prevent an action to recover dower abating by the death of the plaintiff.¹¹

1 *Miller v. Woodman*, 14 Ohio, 518; *Tuck v. Fitts*, 18 N. H. 171; *Rowe v. Johnson*, 19 Me. 146; *Hitt v. Scammon*, 32 Ill. 519.

2 *Sandbank v. Quigley*, 8 Watts, 460; and see *Turney v. Smith*, 14 Ill. 242.

3 *Atkins v. Yeomans*, 6 Met. 438; *McLaughlin v. McLaughlin*, 20 N. J. Eq. 190; *Roan v. Holmes*, 32 Fla. 295; *Park on Dower*, 309.

4 *Parks v. McClellan*, 44 N. J. L. 552.

5 *Pollitt v. Kerr*, 49 N. J. Eq. 65.

6 *Pollitt v. Kerr*, 49 N. J. Eq. 65. See, also, *Johnson v. Thomas*, 2 Paige, 377; *Stieger v. Hillen*, 5 Gill & J. 121; *Paul v. Paul*, 36 Pa. St. 270; *Price v. Hobbs*, 47 Md. 359; *Harper v. Archer*, 28 Miss. 212; *Curtis v. Curtis*, 2 Brown Ch. 620.

7 *Lynde v. Wakefield*, 19 Mont. 23.

8 *Magruder v. Smith*, 79 Ky. 512.

9 *Tibbetts v. Langley Mfg. Co.*, 12 S. C. 465.

10 *Fulton v. Fulton*, 8 Abb. N. C. 210.

11 *Robinson v. Govers*, 67 Hun, 317; 22 N. Y. Supp. 249.

§ 608. Value of Land Alienated—Improvements.

By the rule of the common law, as against the heir, the widow is entitled to dower according to the value of the land at the time dower is assigned.¹ And it appears to be settled in England that the same rule that applies as between the widow and the heir should apply as between the widow and the alienee, and by that rule the widow gets the benefit of all improvements made by the alienee subsequent to the time when the husband parted with his estate.² But in this

country the rule in such cases, according to the weight of authority, is more favorable to the purchaser, and excludes the widow from taking advantage of his improvements upon the estate, but allows her to have the benefit of any rise in value resulting from other causes, the policy of the rule being to avoid discouraging purchasers from making improvements.³ In other words, if the value of the land aliened by the husband has been enhanced by improvements made by the alienee, the widow is entitled to dower only according to the value of the land without such improvements so made.⁴ Briefly, she is entitled to be endowed according to the value of the land at the time it was aliened.⁵ And nothing appearing to the contrary, it will be presumed that the commissioner appointed to assign dower estimated it according to this rule.⁶ But increase in the value of the land after alienation arising from circumstances unconnected with improvements may be shared by the wife, and in assigning dower to her the value of such lands at the death of the husband is to be considered as the basis of the assignment, except in so far as the enhancement in value after the conveyance resulted from improvements made by the husband's alienee.⁷ It is held that a purchaser under execution occupies the same position in regard to improvements made by him on lands, in which the widow is entitled

to dower, as if the land had been directly conveyed to him by the husband.⁸ And if the wife, after the husband's death, seeks to have dower assigned in the lands, and the value thereof at the time of the husband's death is greater than at the time of the execution sale, the latter value alone must be considered in assigning dower, if its enhancement is the result of improvements made upon the land.⁹ There is held to be no difference in principle between the legal effect of a conveyance to a stranger for a valuable consideration, and one to a child for a good consideration, as regards the rights of the grantor's widow to dower in the premises conveyed. And in assessing the value of her dower in such case, she will be confined to the improvements on the land at the time of the conveyance, although, after the conveyance, the grantor may have erected a house on the premises with his own means.¹⁰ Where lands aliened by the husband have depreciated in value from any cause, the widow is entitled to dower according to the value at the time of the assignment of dower. Although she gains nothing by the improvements of the alienee, yet she suffers loss by his waste or neglect depreciating the value of the property.¹¹

1 Coke on Littleton, 32a; McClanahan v. Porter, 10 Mo. 746; Larrows v. Beam, 10 Ohio, 498; Catlin v. Ware, 9 Mass. 218, 6 Am. Dec. 56; McGehee v. McGehee, 42 Miss. 747.

2 Riddell v. Gwinnell, 1 Q. B. 682.

3 See Powell v. Monson etc. Mfg. Co., 3 Mass. 347; Bowie v. Berry, 1 Md. Ch. 452; Price v. Hobbs, 47 Md. 350; Smith v. Addleman, 5 Blackf. 406; Boyd v. Carlton, 60 Me. 200, 31 Am. Rep. 268; Sanders v. McMillan, 98 Ala. 144, 39 Am. St. Rep. 19, and see note thereto; Dunseth v. Bank of United States, 6 Ohio, 77; Rawlins v. Buttel, 1 Houst. 224.

4 Van Dorn v. Van Dorn, 3 N. J. L. (*697) 270, 4 Am. Dec. 408; Hobbs v. Harvey, 16 Me. 80; Dashiel v. Collier, 4 J. J. Marsh. 601; Davis v. Hutton, 127 Ind. 481.

5 Stearns v. Swift, 8 Pick. 532; Hale v. James, 6 Johns. Ch. 258, 10 Am. Dec. 358; Linn v. Robinson, 21 Ala. 547; Thompson v. Morrow, 5 Serg. & R. 289, 9 Am. Dec. 358; Raynor v. Raynor, 21 Hun, 36, 40.

6 Corriell v. Bronson, 6 Iowa, 471.

7 Butler v. Fitzgerald, 43 Neb. 192, 47 Am. St. Rep. 741; McClanahan v. Porter, 10 Mo. 746; Allen v. McCoy, 8 Ohio, 418; Thompson v. Morrow, 5 Serg. & R. 289, 9 Am. Dec. 358; Powell v. Monson etc. Mfg. Co., 3 Mass. 347; Thornburn v. Doscher, 32 Fed. Rep. 810; Fritz v. Tudor, 1 Bush, 28; Ware v. Owens, 42 Ala. 212, 94 Am. Dec. 642; Wood v. Morgan, 56 Ala. 397; Sanders v. McMillan, 98 Ala. 144, 39 Am. St. Rep. 19, and see note thereto. But see Tod v. Baylor, 4 Leigh, 498.

8 Ayer v. Spring, 10 Mass. 80; Price v. Hobbs, 47 Md. 350.

9 Butler v. Fitzgerald, 43 Neb. 192, 47 Am. St. Rep. 741. See Gove v. Cather, 23 Ill. (*634) 585, 76 Am. Dec. 711.

10 Stookey v. Stookey, 89 Ill. 40.

11 McClanahan v. Porter, 10 Mo. 746.

§ 609. Writ of Seisin—Damages.

The purpose of the action unde nihil habet, and subsequently the primary purpose of resort to a court of equity, is to have the right of a widow to dower determined, and, this being determined in her favor, it is enforced by a writ

of seisin, whereby she is placed in possession of real estate equal in value to one-third of that of which her husband died seised, and this is set apart to her by metes and bounds. If she be entitled to damages, this is ascertained by a writ of inquiry, if the proceeding be at law, and by the stating of an account by a master if it be in equity.¹ Writs of seisin and of inquiry are generally blended or united in the same writ, in which case damages are properly assessed up to the suing out of the inquisition.² At common law, when dower was detained from the widow, and she was compelled to resort to her writ of dower, she could recover no damages for the detention, but was entitled only to the profits of her third part of the land from the time of judgment recovered. To remedy this defect in the law, a statute known as the statute of Merton³ was enacted, which gave the demandant damages equal to the value of her dower from the time of her husband's death, or, by construction, from the time of demand made.⁴ But the statute of Merton, by its express terms, only applies where the husband died seised, and in those cases, therefore, where the husband does not die seised, as where the land is aliened in his lifetime, no damages can be assessed in an action unde nihil habet for detention from the time of the husband's death to the date of assignment of dower.⁵ If the hus-

band has aliened the lands, no damages can be recovered by the widow against the alienee, without a demand of dower and a refusal, and then only from the time of making the demand.⁶ In case of judgment by default in an action of dower, the demandant, if she seeks to recover damages under the statute, must suggest upon the record that the husband died seised, or that she had demanded her dower, and thereupon a writ of inquiry will be awarded to inquire as to the truth of such suggestion. So held under the New Jersey statute giving damages "from the time of demanding dower," if the husband did not die seised.⁷ In equity, the widow may have a decree for an account of rents and profits against the alienee, or those claiming under him, which accrue after dower demanded, and it is held that she may even proceed in equity for such rents and profits after she has recovered her dower at law.⁸

1 *Gannon v. Widman*, 3 Pa. Dist. Rep. 835. See, as to allotment of dower by metes and bounds, vol. 1, sec. 69, ante; also, *Steele v. Brown*, 70 Ala. 235; *Sanders v. McMillan*, 98 Ala. 144, 39 Am. St. Rep. 19; *Benner v. Evans*, 3 Penr. & W. 454.

2 *Martin v. Martin*, 14 N. J. L. 125, 131. Scire facias lies to obtain a writ of seisin of dower where judgment has been rendered and the time for issuing such writ has expired: *Walker v. Gilman*, 45 Me. 28.

3 20 Henry III, c. 1.

4 Coke on Littleton, 32 b.

5 See *Sharp v. Pettit*, 3 Yeates, 38; *Shirtz v. Shirtz*, 5 Watts, 257; *Barnet v. Barnet*, 15 Serg. & R. 73, 16 Am. Dec. 516. *Gannon v. Widman*, 3 Pa. Dist. Rep. 835; *Waters v. Gooch*, 6 J. J. Marsh. 586, 22 Am. Dec. 108; and see vol. 1, sec. 71, and note 10.

6 *Layton v. Butler*, 4 Harr. (Del.) 507.

7 *Martin v. Martin*, 14 N. J. L. 125. See *Waters v. Gooch*, 6 J. J. Marsh. 586, 22 Am. Dec. 108.

8 *Sellman v. Bowen*, 8 Gill & J. 50, 29 Am. Dec. 524; *Kiddall v. Trimble*, 1 Md. Ch. 143; affirmed, 8 Gill, 207; *Price v. Hobbs*, 47 Md. 359; and see, also, *Loudon v. Loudon*, 20 Tenn. 1.

§ 610. Costs.

Where the demandant in a writ of dower recovered damages, she was entitled to costs of the suit.¹ If the husband did not die seised, neither damages nor costs could be recovered.² If no obstacle is thrown in the widow's way to the recovery of dower, she is not entitled to costs.³ In an action of ejectment by a widow to recover her dower under the provisions of the New York statute, she was entitled to costs, though the suit was brought before the admeasurement of dower;⁴ but such costs could be avoided by the tenants assigning dower during the quarantine of the widow.⁵ Under the New York Code of Civil Procedure, section 3228, subdivision 1, the plaintiff in an action for dower, if successful, is entitled to costs of course, since it is an action to recover an interest in real property, and is triable by a jury;⁶ so held, also, although the action was tried to a referee.⁷ In South Carolina, a demand-

ant of dower in lands of her husband aliened during coverture is entitled to her costs, although the dower was not demanded before the institution of the suit.⁸ She is entitled as of right to her costs for all expenses incurred in the admeasurement of her dower, including her exceptions to a return, which was finally confirmed.⁹ In an equity proceeding for assignment of dower, the question of costs is said to depend entirely upon the character of the complainant's claim, and the nature of the defense, and that it is competent for the court in its discretion to allow or disallow them.¹⁰ If there is no opposition or undue hindrance to the proceedings on the part of the defendants, the widow is not allowed costs.¹¹ Where both the heir and the widow set up pretensions that were not well founded, neither party was allowed costs.¹² And where a widow makes no demand of dower prior to filing her bill, and claims by her bill much more than she was entitled to, she will be allowed no costs.¹³ Under the Illinois statute, in a suit for partition or the assignment of dower, when no defense is set up, the court is authorized to order the payment of a reasonable attorney's fee.¹⁴

1 Hillyer v. Larzelere, 10 Johns. 216; Waters v. Gooch, 6 J. J. Marsh. 586, 22 Am. Dec. 108.

2 Fisher v. Morgan, 1 N. J. L. 125; Sheppard v. Wardell, 1 N. J. L. 452.

3 Beavers v. Smith, 11 Ala. 20; and see Morgan v. Ryder, 1 Ves. & B. 20.

- 4 Walker v. Schuyler, 10 Wend. 481.
- 5 Yates v. Paddock, 10 Wend. 529.
- 6 Everson v. McMullen, 45 Hun, 578; Smith v. Smith, 6 Lans. 313.
- 7 Jones v. Emery, 1 Civ. Proc. 338.
- 8 Irwin v. Brooks, 19 S. C. 96.
- 9 Fooshe v. Merriwether, 20 S. C. 337; and see Vance v. Becknall, 1 Bail. 140; Harshaw v. Davis, 1 Strob. 74.
- 10 Grove v. Todd, 45 Md. 252.
- 11 Hazen v. Thurber, 4 Johns. Ch. 604; Hale v. James, 6 Johns. Ch. 258, 10 Am. Dec. 328; and see Bamford v. Bamford, 5 Hare, 203; Curtis v. Curtis, 2 Bro. C. C. 620.
- 12 Swaine v. Perine, 5 Johns. Ch. 482, 9 Am. Dec. 318.
- 13 Russell v. Austin, 1 Paige, 192.
- 14 Reynolds v. McMillan, 63 Ill. 46; and see Burnet v. Burnet, 46 N. J. Eq. 144.

CHAPTER XXXVIII.

WASTE.

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§ 611. Writ of Prohibition.¹

At common law, if the owner of the inheritance had good reason to believe there was a design to commit waste on the part of a tenant in dower or by the curtesy, or a guardian, such owner might, before any waste was done, have a writ of prohibition directed to the sheriff, commanding him to prevent it from being done; and in the execution of this writ the sheriff might, if necessary, call to his aid the posse comitatus.² This writ was subjected, in the years 1267 and 1285, respectively, to statutory extension and substitution;³ and it seems to have been the basis of the jurisdiction later exercised by the court of chancery in granting injunctions against waste.⁴

1 See, as to what constitutes waste, etc., c. XII, ante.

2 *Duvall v. Waters*, 1 Bland, 569, 18 Am. Dec. 350, 353; and see *Jefferson v. Bishop of Durham*, 1 Bos. & P. 105, 120, 132; *Goodison v. Gallatin*, Dick. 455; *Coke on Littleton*, 53i; 2 *Coke's Institutes*, 299, 339.

3 *Jefferson v. Bishop of Durham*, 1 Bos. & P. 105, 121; *Bacon's Abridgment*, tit. Waste, K., *Bouvier's Am. ed.*, 451.

4 *Duvall v. Waters*, 1 Bland, 569, 18 Am. Dec. 350, 353.

§ 612. Writ or Action of Waste.

After waste had been actually committed, the ancient corrective remedy, in a court of common law, was by a writ or action of waste;¹ and under this remedy, as extended by an early statute, there could be recovery of the place wasted, and treble damages as a compensation for the injury done to the inheritance.² Originally, the common law thus gave remedy against waste by guardian in chivalry, tenant in dower, and tenant by the curtesy, because their estates were created by the law itself; but, as is commonly considered, until the statutes of Marlbridge (52 Henry III, c. 24) and Gloucester (6 Edward I, c. 5) there was no protection against waste by tenants for life or years, because they came in by act of the parties,³ and the settler might have provided against the commission of waste by them.⁴ Nor was the remedy available to any person except him who had the immediate estate of inheritance in reversion or remainder⁵ at the time the waste was committed.⁶ The basis for this position lay in the very nature of waste, as being a permanent injury to the inheritance,⁷ or to an interest therein.⁸ But by the statute of Marlbridge (52 Henry III, c. 24), enacted in 1267, the disability of committing waste was made an ordinary and general incident to all kinds of estates for life and for

years;⁹ and the actual damages sustained by the reversioner were recovered in an action of waste.¹⁰ Later, in 1278, the oft-mentioned statute of Gloucester (6 Edward I, c. 5) was passed, whereby there could be recovery of the place wasted, and treble damages;¹¹ whereas, under the previous state of the law single damages alone could be recovered except against a guardian, who also forfeited his wardship by virtue of the great charter.¹² Finally, by the statute of Westminster (13 Edward I, c. 22), which was passed in 1284, the action was made maintainable by one cotenant against another.¹³

1 See Coke on Littleton, 53; 2 Coke's Institutes, 299, 300; 3 Blackstone's Commentaries, 227, 229.

2 Duvall v. Waters, 1 Bland, 569, 18 Am. Dec. 350, 353. See, also, 3 Blackstone's Commentaries, 228.

3 See Lander v. Hall, 69 Wis. 326, 330.

4 Yool on Law of Waste, Nuisance, and Trespass, 4; and see 2 Blackstone's Commentaries, 282, 283; 3 Blackstone's Commentaries, 224, 225; 2 Coke's Institutes, 299; Sampson v. Grogan, 21 R. I. 174; Shrewsbury's Case, 5 Coke, 13; Sackett v. Sackett, 8 Pick. 309, 312; Moore v. Ellsworth, 3 Conn. 483, 487. Compare 4 Kent's Commentaries, 79, 80; Browne v. Blick, 3 Murph. 511, 518.

5 3 Blackstone's Commentaries, 224, 225; Coke on Littleton, 53; and see Clifton's Case, 5 Coke, 76; Powell v. Dayton etc. R. R. Co., 16 Or. 33, 8 Am. St. Rep. 251; Davenport v. Magoon, 13 Or. 1, 57 Am. Rep. 1, 3; Hatch v. Hatch, 31 Cin. Law Bull. 57, 61; Browne v. Blick, 3 Murph. 511; Peterson v. Clark, 15 Johns. 205. Compare Loudon v. Warfield, 5 J. J. Marsh. 196, 198.

6 Yool on Law of Waste, Nuisance, and Trespass, 4, 5; Duvall v. Waters, 1 Bland, 569, 18 Am. Dec. 350, 354.

7 *Davenport v. Magoon*, 13 Or. 1, 57 Am. Rep. 1; *Wilds v. Layton*, 1 Del. Ch. 226, 12 Am. Dec. 91, 92; and see sec. 113, ante.

8 *Duvall v. Waters*, 1 Bland, 569, 18 Am. Dec. 350, 353.

9 *Sampson v. Grogan*, 21 R. I. 174. See, also, *Sackett v. Sackett*, 8 Pick. 309, 313; 1 *Greenleaf's Cruise on Real Property*, 127; *Moore v. Townsend*, 33 N. J. L. 284, 300.

10 *Sampson v. Grogan*, 21 R. I. 174; 1 *Washburn on Real Property*, 118; 1 *Washburn on Real Property*, 5th ed., 158.

11 See *Sackett v. Sackett*, 8 Pick. 309; *Sampson v. Grogan*, 21 R. I. 174; 3 *Blackstone's Commentaries*, 227, 228; 4 *Kent's Commentaries*, 79, 80; *Harrow School v. Alderton*, 2 Bos. & P. 86; *Parker v. Chambliss*, 12 Ga. 235; *Chipman v. Emeric*, 3 Cal. 273; *Moore v. Townsend*, 33 N. J. L. 284.

12 See 2 *Blackstone's Commentaries*, 283; *Sampson v. Grogan*, 21 R. I. 174; 2 *Coke's Institutes*, 146, 300.

13 3 *Blackstone's Commentaries*, 227, 228; *Bacon's Abridgment*, tit. Waste, G.

§ 613. Writ of Estrepement.

Another remedy at the common law was the writ of estrepement, which, as its very name imports,¹ was intended to stay waste.² This auxiliary remedy was not only analogous to a writ of prohibition, in being a preventive remedy, but it was also a corrective remedy, because, if waste were committed in spite of its prohibition, by the writ of estrepement, damages might be recovered for such waste, even up to the time when possession was delivered.³ Originally, at common law, however, the writ of estrepement lay only after judgment⁴ in any action real, and before posses-

sion was delivered by the sheriff, to stop any waste which the vanquished party might be tempted to commit in lands which were determined to be no longer his.⁵ But the statute of Gloucester (6 Edward I, c. 13) gave another writ of estrepement, to preclude the commission of waste pending the action;⁶ and by an equitable construction of this statute, and in advancement of the remedy, the writ of estrepement, to prevent waste, might be had at every stage of the action; as well in actions wherein damages were recovered as in those wherein possession was had of the lands; so that in an action of waste itself, to recover the place wasted and also damages, a writ of estrepement would lie as well before as after judgment.⁷ The writ of estrepement was at one time in common use in some jurisdictions in this country; but here, as well as in England, it has generally become obsolete, especially in view of the fact that its office may be performed by an injunction.⁸ In Pennsylvania it is, however, still in use under statutes⁹ regarded as declaratory of the common law,¹⁰ at least apart from special variations,¹¹ being obtainable upon affidavit,¹² on giving bond with sureties,¹³ without previous notice to leave the demised premises,¹⁴ and liable to be dissolved,¹⁵ as where it has been issued upon an affidavit charging acts which are not waste upon condi-

tions,¹⁶ or without security or other terms.¹⁷ Such a writ of estrepement, issued at the instance of anyone entitled to object to the commission of waste, is a protection to all persons so situated.¹⁸ In Delaware, the writ of estrepement applies only to real actions and actions of waste, and though it has been extended by statute to possessory actions like ejectment,¹⁹ it will be refused in an action of trespass *quare clausum fregit*.²⁰ The execution of the writ of estrepement, as it is known in England and recognized in Pennsylvania, is very similar to the effect of an injunction issued by a court of equity.²¹ Thus, if a writ of estrepement forbidding waste be directed and delivered, as it may be, to the tenant himself, or to his servants, and he afterward proceeds to commit waste, an action may be maintained upon the basis of this writ.²² In this action the only plea of the tenant can be, that he did not commit the waste in contravention of the prohibition (*non fecit vastum contra prohibitionem*);²³ and if, upon verdict, it be found that he did, the plaintiff may recover costs and damages;²⁴ or the party may proceed to punish the defendant for the contempt;²⁵ for if, after the writ is directed and delivered to the tenant or his servants, they proceed to commit waste, the court will imprison them²⁶ for this contempt of the writ.²⁷ But it is otherwise if the writ were directed to the sheriff,

for then it is incumbent upon him to prevent the estrepement absolutely, even, if necessary, by raising the posse comitatus;²⁸ and the same is true if the writ be directed to the coroner in lieu of the sheriff.²⁹

1 "Estrepement" comes from the French "estramer," to strip, destroy, itself derived from the Latin "extirpare," to extirpate or root out: Anderson's Law Dictionary, 417; and see 3 Blackstone's Commentaries, 225; Jones v. Whitehead, Pars. Sel. Cas. 304, 305.

2 Duvall v. Waters, 1 Bland, 350, 18 Am. Dec. 350, 353.

3 Duvall v. Waters, 1 Bland, 569, 18 Am. Dec. 350, 355.

4 See 2 Coke's Institutes, 329.

5 3 Blackstone's Commentaries, 225. See Jones v. Whitehead, Pars. Sel. Cas. 304, 306; Brown v. O'Brien, 3 Pa. L. J., bottom p. 93.

6 See Jones v. Whitehead, Pars. Sel. Cas. 304, 306; Brown v. O'Brien, 3 Pa. L. J., bottom pp. 93, 97.

7 3 Blackstone's Commentaries, 225, 226.

8 Duvall v. Waters, 1 Bland, 569, 575, 18 Am. Dec. 350, 356. See Loudon v. Warfield, 5 J. J. Marsh. 96.

9 See Jones v. Whitehead, Pars. Sel. Cas. 304; 4 Kent's Commentaries, 78, note a; Brown v. O'Brien, 3 Pa. L. J. 93.

10 Byrne v. Boyle, 37 Pa. St. 260, 262. Or facilitating the use of the writ as known under that law as extended by the statute of Gloucester; Brown v. O'Brien, 3 Pa. L. J., bottom p. 93.

11 Brown v. O'Brien, 3 Pa. L. J., bottom p. 93.

12 Agnew v. Sutton, 16 Pa. Co. Ct. 77, 78.

13 Agnew v. Sutton, 16 Pa. Co. Ct. 77, 78. As to when there can be no recovery upon the estrepement bond, see Kulp v. Bowen, 122 Pa. St. 78.

14 Heil v. Strong, 44 Pa. St. 264. As to conditions of issuance to prevent waste by quarrying or mining, see Brown v. O'Brien, 3 Pa. L. J., bottom p. 93.

15 *Snyder v. Depew*, 1 Lackawanna Legal Record, 477.

16 *Hensal v. Wright*, 10 Pa. Co. Ct. 416.

17 *Byrne v. Boyle*, 37 Pa. St. 260, 262; *Brown v. O'Brien*, 3 Pa. L. J., bottom pp. 93, 99.

18 *Duff's Appeal*, 21 Week. Not. Cas. 491, 493.

19 *Higgins v. Roe*, 3 Harr. 49. See *Burbage v. Dazy*, 5 Harr. (Del.) 324, 325.

20 *Burbage v. Dazy*, 5 Harr. (Del.) 324, 325. Reference to the use of the writ in this jurisdiction is made in 4 Kent's Commentaries, 78, note a.

21 *Jones v. Whitehead*, Pars. Sel. Cas. 304, 306.

22 3 Blackstone's Commentaries, 226, 227; *Jones v. Whitehead*, Pars. Sel. Cas. 304, 306.

23 See *Playston v. Bacheller*, Moore, 100.

24 See *Playston v. Bacheller*, Moore, 100.

25 3 Blackstone's Commentaries, 227; *Jones v. Whitehead*, Pars. Sel. Cas. 304, 306.

26 See *Cumberland v. Dowager*, Hob. 85.

27 3 Blackstone's Commentaries, 227; *Jones v. Whitehead*, Pars. Sel. Cas. 304, 307.

28 3 Blackstone's Commentaries, 227; and see *Foliamb's Case*, 5 Coke, 115; *Jones v. Whitehead*, Pars. Sel. Cas. 304, 307.

29 *Cumberland v. Dowager*, Hob. 85. The sheriff might also imprison the offenders, or make a warrant to others to do so: See 3 Blackstone's Commentaries, 226; 2 Coke's Institutes, 329; *Jones v. Whitehead*, Pars. Sel. Cas. 304, 307; *Foliamb's Case*, 5 Coke, 115.

§ 614. Action in the Nature of Waste.

The writ or action of waste has likewise fallen into disuse in this country as well as in England, where it has been expressly abolished and is seldom or never brought,¹ having given way to the more easy and expeditious remedy of an action on the case in the nature of waste at common law,²

by which the plaintiff obtains satisfaction for the injury done to his inheritance by a recovery of damages alone.³ The recovery is for those damages which are equitably commensurate with the injury.⁴ Such damages are as ample a remedy as was obtainable under the old writ or action of waste, in cases where the term has expired, and the party complaining of the waste has got possession of his estate; while on account of the defective and imperfect mode of recovering seisin which experience showed such writ or action to be, care came to be taken to give the lessor power of re-entry where the demise was by deed, and then an action on the case was found to be the superior remedy for the recovery of mere damages.⁵ Another advantage sometimes claimed for the new form of action was that privity of estate being no longer necessary, as it was to maintain the old action,⁶ the action in the nature of waste could be brought by the person having the reversionary interest, even after he had transferred the same,⁷ or where he had purchased the estate after the waste had been committed,⁸ and need not be brought, as before, against the tenant instead of his assignee or any other like occupant,⁹ but could be brought against such assignee¹⁰ or any stranger as well as against the lessee.¹¹ Despite the advantages thus appertaining to the action in the nature of waste, we find that in England there

was at first some reluctance in allowing such an action on the case.¹² It has also sometimes been questioned whether under the new form of action, there is liability for permissive as well as for voluntary waste,¹³ at any rate on the part of a tenant in dower, or other mere tenant for life.¹⁴ But it is generally considered that the new remedy has superseded the old in regard to both permissive and voluntary waste;¹⁵ and it has been claimed with much reason that there was no distinction between them even under the prior remedy.¹⁶

1 See, however, for an instance of its use at one time, *Adams v. Brereton*, 3 Har. & J. 124.

2 See *Greene v. Cole*, 2 Saund. 252, note 7; 2 Chitty's Blackstone, 178, note 7; *White v. Wagner*, 4 Har. & J. 373, 393, 7 Am. Dec. 674; *M'Laughlin v. Long*, 5 Har. & J. 113, 114; *Dozier v. Gregory*, 1 Jones, 100, 104.

3 *Duvall v. Waters*, 1 Bland, 569, 575, 18 Am. Dec. 350, 356, note. See *Parker v. Chambliss*, 12 Ga. 235, 238.

4 *Randall v. Cleaveland*, 6 Conn. 328, 330.

5 2 Chitty's Blackstone, 178, note 7. The latter action had another advantage, besides carrying costs, and this was that it might be brought by the person who had the reversion or remainder for life or years, as well as in fee or tail: 2 Chitty's Blackstone, 178, note 7.

6 *Bates v. Shraeder*, 13 Johns. 260, 263; *Browne v. Blick*, 3 Murph. 511, 519; *Lander v. Hall*, 69 Wis. 326, 330.

7 *Dickinson v. Mayor*, 48 Md. 583, 588, 30 Am. Rep. 492, 494.

8 *Dupree v. Dupree*, 4 Jones, 387, 69 Am. Dec. 757, 759.

9 Compare, however, *Foot v. Dickinson*, 2 Met. 611, 612; *Stauffer v. Eaton*, 13 Ohio, 322, 333; *Powell v. Dayton etc. R. R. Co.*, 16 Or. 33, 8 Am. St. Rep. 251, 259; *Dickinson v. Mayor*, 48 Md. 583, 30 Am. Rep. 492, 494.

10 *Short v. Wilson*, 13 Johns. 33, 38. But compare *Stauffer v. Eaton*, 13 Ohio, 322, 333.

11 *Chase v. Hazelton*, 7 N. H. 171, 175; *Randall v. Cleaveland*, 6 Conn. 328, 329; sec. 119, ante; *Dupree v. Dupree*, 4 Jones, 387, 69 Am. Dec. 757, 760; *Dickinson v. Mayor*, 48 Md. 583, 30 Am. Rep. 492, 494. Compare *Lander v. Hall*, 69 Wis. 326, 330.

12 2 Chitty's Blackstone, 178, note 7; *Greene v. Cole*, 3 Wms. Saund. 252, note 7. See *Jefferson v. Jefferson*, 3 Lev. 130.

13 2 Chitty's Blackstone, 178, note 7; *Greene v. Cole*, 3 Wms. Saund. 252, note 7 (i). But see *Moore v. Townsend*, 33 N. J. L. 284, 303; 4 Kent's Commentaries, 79.

14 See *Dozier v. Gregory*, 1 Jones, 100, 102. But compare *Moore v. Townsend*, 33 N. J. L. 284, 300.

15 See 2 Chitty's Blackstone, 187, note 7; *Moore v. Townsend*, 33 N. J. L. 284, 300; *Greene v. Cole*, 3 Wms. Saund. 252, note 7; sec. 119, ante.

16 *Moore v. Townsend*, 33 N. J. L. 284, 302. But see 4 Kent's Commentaries, 79.

§ 615. Statutory Regulation of Subject.

There have been conflicting decisions in different jurisdictions as to whether the common law of this country followed the statute of Marlbridge (52 Henry III, c. 24) by which damages alone could be recovered, or the statute of Gloucester (6 Edward I, c. 5) by which the place wasted was forfeited, and treble damages were also given.¹ The matter is sometimes regulated by statute; and under such regulation it has been held in one of our jurisdictions that in an action on the case in the nature of waste, damages alone could be recovered, and not a forfeiture of the life estate, such as might be had, if at all, in an ac-

tion of waste, which is a real action.² A statute giving an action of waste as a remedy for injury to the reversion³ does not, however, take away the common-law right to bring an action on the case for waste, where such statute, giving a remedy in the affirmative, is merely cumulative, and is not exclusive as creating a new right.⁴ The action of waste may sometimes be held to be in force, yet the action in the nature of waste come to be used⁵ before the former was abolished by statute.⁶ Sometimes it appears to be left uncertain whether the statutory action for waste is the old action of waste or an action in the nature of waste, though it is treated like the former in requiring privity of estate.⁷ In some of our American jurisdictions, such as New York, though the remedy, called an action for waste, is by an action in the nature of waste, and is given to others than those having the immediate estate of inheritance, yet the older law is followed by the statute in making the remedy applicable to tenants for life or years as well as by the curtesy and in dower, and to the assignees of such tenants as well as the tenants themselves,⁸ and in giving not only treble damages,⁹ but also, under some circumstances, forfeiture of the estate and possession of the place wasted.¹⁰ In other of our jurisdictions, such as California, as well as in Montana, there may be recovery of treble damages, but

there is no forfeiture of the estate.¹¹ Sometimes, on the other hand, forfeiture of the estate seems to be the sole remedy, as in Georgia, where the willful commission of acts amounting to waste forfeits the interest of a tenant for life, if the remainderman elects to claim immediate possession.¹² In still other states, such as Pennsylvania prior to the statutes authorizing the writ of estrepement, resort appears to have been had neither to the writ of waste, nor to an action on the case in the nature of waste, but generally the remedy against a tenant was by an action on the contract of lease.¹³ In some states, like Connecticut, it required the interposition of statute to create liability for waste against persons having an estate for life,¹⁴ or for years.¹⁵

1 Stetson v. Day, 51 Me. 434, 435. See Sackett v. Sackett, 8 Pick. 309, 312; Smith v. Follansbee, 13 Me. 273, 277. Compare, also, Parker v. Chambliss, 12 Ga. 235, 236; Jenks v. Langdon, 21 Ohio St. 362, 369.

2 Stetson v. Day. 51 Me. 434, 435.

3 See Clemence v. Steere, 1 R. I. 272, 53 Am. Dec. 621, 622.

4 Thackeray v. Eldigan, 21 R. I. 481, 690; and see as to statutes in general, Colt v. Sears Commercial Co., 20 R. I. 323, 325; Coggeshall v. Groves, 16 R. I. 18; Smith v. Tripp, 14 R. I. 112; Fisher v. Warwick R. R. Co., 12 R. I. 287; Inman v. Tripp, 11 R. I. 520, 526, 23 Am. Dec. 520; Crittenden v. Wilson, 5 Cow. 165, 168, 15 Am. Dec. 462; 7 Lawson's Rights, Remedies, and Practice, sec. 3777.

5 Dozier v. Gregory, 1 Jones, 100.

6 Shields v. Lawrence, 72 N. C. 43, 45.

7 Lander v. Hall, 69 Wis. 326, 330; Whitney v. Morrow, 34 Wis. 644, 646.

8 See *Rutherford v. Aiken*, 3 *Thomp. & C.* 60, 61.

9 See *Rutherford v. Aiken*, 3 *Thomp. & C.* 60, 62.

10 *N. Y. Code Civ. Proc.* 1895, secs. 1651, 1655; 2 *Bliss' Ann. Code*, 4th ed., 2178, 2180; *Penton v. Watson*, 19 *N. Y. St. Rep.* 6; *Robinson v. Kime*, 70 *N. Y.* 147, 155. In Kentucky it is prescribed that the person subject to an action of waste, who need not have the immediate estate of inheritance, shall lose the thing wasted, and pay treble the amount at which the waste shall be assessed: *Ky. Gen. Stats.* 1887, art. 3, c. 66, sec. 1, p. 851. Yet it appears that the waste must be wantonly committed to cause judgment to be entered for three times the amount of the damages assessed; *Ky. Gen. Stats.* 1887, art. 3, c. 66, sec. 7, p. 851.

11 *Cal. Code Civ. Proc.*, sec. 732; *Chipman v. Emeric*, 3 *Cal.* 273, 283; *Mont. Code Civ. Proc.*, sec. 1301; 3 *Ann. Codes* 1895, p. 345. In South Dakota, however, there can also be forfeiture of the estate of the party offending, and eviction from the premises: 2 *S. Dak. Ann. Stats.* 1899 (*Code Civ. Proc.*), sec. 6008, p. 1687; but in North Dakota and in Indiana this is allowed, as in New York, only when the injury to the reversion is adjudged equal to the value of the tenant's estate or unexpired term, or to have been done in malice: *N. Dak. Rev. Codes* 1895 (*Code Civ. Proc.*), secs. 5921, 5922, p. 1069; *Sullivan v. O'Hara*, 1 *Ind. App.* 259, 261. In some states there may be recovery merely of single damages, or of double damages. See 1 *Greenleaf's Cruise on Real Property*, 127, note; 1 *Washburn on Real Property*, 5th ed., 163, 165, note.

12 *Ga. Code* 1895, sec. 3090, p. 520. But prior to this or any enactment on the subject tenant in dower was liable neither to forfeiture of the estate nor to treble damages: *Parker v. Chambliss*, 12 *Ga.* 235, 236.

13 *Shult v. Barker*, 12 *Serg. & R.* 272, 273.

14 *Moore v. Ellsworth*, 3 *Conn.* 483, 486; *Hamden v. Rice*, 24 *Conn.* 350, 356.

15 *Conn. Gen. Stats.* 1888, sec. 1348, p. 315. An action on the case in the nature of waste is thus sustainable by the reversioner against a stranger: *Randall v. Cleveland*, 6 *Conn.* 328, 329. In New Jersey the statutory liability for waste made or suffered extends not only to a tenant for life or for years, but to a tenant for any other term: *Moore v. Townshend*, 33 *N. J. L.* 284.

§ 616. Survival of Action.

The fact that the action of waste is not mentioned among actions that survive may justify the conclusion that such an action, especially as it was founded on a highly penal statute, abated, so that it could not be revived against the personal representatives of a tenant for life;¹ but the silence of the statute could have no such effect after the old technical action of waste had been abolished, and an ordinary action substituted.² Where the statute allows the survival of actions for wrongs done to the property, which would cover waste, and authorizes executors and administrators to sue for injuries to the real estate in actions which partake of the nature of waste, such as trespass, there seems no reason why an action for waste should not survive and be assignable.³

1 Browne v. Blick, 3 Murph. 511, 517.

2 Shields v. Lawrence, 72 N. C. 43, 45.

3 Rutherford v. Aiken, 3 Thomp. & C. 60, 61.

§ 617. Rule or Order to Stay Waste.

Sometimes it has happened that a court of law has granted a rule to stay waste in the course of an ejectment suit.¹ Where, upon the basis that such rule has been disobeyed, an attachment for contempt is sought against the person charged to have committed waste, notice of the taking of

affidavits to prove the waste should be served on the party, and not on his attorney.² An order restraining waste in the course of an ejectment suit has also sometimes been granted in pursuance of a statute authorizing such an order in actions for the recovery of land or of the possession thereof.³

1 Flommerfelt v. Zellers, 7 N. J. L. 31.

2 Flommerfelt v. Zellers, 7 N. J. L. 31, 32.

3 People v. Davison, 4 Barb. 109, 111.

§ 618. Trover.

Waste is a tort, for which one of the remedies at law is an action of trover for damages.¹ Thus, a tenant who commits waste by cutting timber, acquires no title to the timber which he thus unlawfully cuts; and as, of course, he can likewise convey no title, a bona fide purchaser from him acquires no title, but is liable in trover to the true owner.² Trover, rather than waste, is the remedy against a tenant who cuts down and carries away the trunks of trees blown down by a tempest.³

1 Jesus College v. Bloome, 3 Atk. 262, 263; and see 1 Greenleaf's Cruise on Real Property, 134.

2 Mooers v. Wait, 3 Wend. 104, 108, 20 Am. Dec. 667, 669. And see Farrant v. Thompson, 5 Barn & Ald. 826, 828. Compare White v. Fox, 125 N. C. 544, 74 Am. St. Rep. 654. As to the alternatives of replevin, trespass de bonis, or action for money had and received, on removal of timber, hay, etc., see sec. 121, note 13, ante.

3 Shult v. Barker, 12 Serg. & R. 272. As to trover or trespass by mortgagee for timber, etc., cut and removed, see note to Webber v. Ramsey, 43 Am. St. Rep. 434.

§ 619. Replevin.

If a tenant for life cut timber trees for sale so as to constitute waste, the trees thus cut become the property of the reversioner;¹ and the latter may maintain replevin for the logs thus produced.²

1 *Richardson v. York*, 14 N. H. 216, 218.

2 *Richardson v. York*, 14 N. H. 216. As to replevin by mortgagee for timber cut or fixtures or buildings removed from the mortgaged premises, see note to *Webber v. Ramsey*, 43 Am. St. Rep. 435.

§ 620. Trespass.

For the cutting of trees by a third person, the tenant for life of the land on which they were cut may bring trespass quare clausum for the disturbance of his possession and the reversioner may bring case for the injury to the reversion.¹ But when the trees are once cut and severed, the tenant ceases to have any interest in them, or right to them, and they become the absolute property of the reversioner; and this absolute ownership draws after it and with it the legal possession, so that the owner may maintain trespass de bonis for carrying away and converting them, even though he never had the actual possession of them.²

1 *Lane v. Thompson*, 43 N. H. 320, 324. But the remedy of a remainderman on whose inheritance waste is being committed by the cutting of timber for sale is not in trespass, but in case for the recovery of damages

for the injury done to the freehold: *Yocum v. Zahner*, 162 Pa. St. 468, 475.

2 *Lane v. Thompson*, 43 N. H. 320, 324. See 1 Chitty on Pleading, 16th Am. ed., 200. Compare *White v. Fox*, 125 N. C. 544, 549, 74 Am. St. Rep. 654. As to trespass or trover by mortgage for value of timber, etc., cut and removed, see note to *Webber v. Ramsey*, 43 Am. St. Rep. 434.

§ 621. Action for Money Had and Received.

If a tenant for life, impeachable for waste, cuts timber without the leave of the court, he will never be permitted to derive any advantage from his wrongful act.¹ His act being in such a case a tortious act, the remainderman may either bring an action of trover for the trees which become his property from the moment they are felled, or an action for money had and received for the produce of the sale of such trees.²

1 *Seagram v. Knight*, L. R. 2 Ch. 628, 630.

2 *Seagram v. Knight*, L. R. 2 Ch. 630, 632.

§ 622. Ejectment.

The forfeiture of the thing wasted is not, at least in the absence of statute, enforceable by any other remedy than an action of waste.¹ Proof of waste by a dowress or other tenant for life is not, therefore, sufficient to authorize a recovery in ejectment by the reversioner.²

1 *Robinson v. Miller*, 2 B. Mon. 284, 292.

2 *Robinson v. Miller*, 2 B. Mon. 284, 292.

§ 623. Injunction as Remedy for Waste.

Waste is a wrong which cannot always be duly estimated and remunerated in damages, and requires to be met, in its onset or earliest approaches, by a strong and decisive preventive remedy, acting with a promptness almost amounting to surprise, and yet affording to the party restrained a speedy hearing.¹ It is evident that no adequate remedy of this kind can be obtained from a court of law,² open only at short intervals during the year, acting from term to term, and limited to a given set of technical forms of proceeding; and hence it is that the remedy has, in modern times, been so constantly sought in the court of chancery, which is always open, constantly accessible, and capable of moving with an energy and dispatch called for by the emergency, and suited to the peculiar nature of the case.³ The especial object of coming into a court of equity is to stay the waste and prevent the wrong, which courts of law cannot do.⁴ The remedy by injunction is fully established,⁵ and has not only virtually superseded the old common-law action of waste, but has to a great extent taken the place of the action on the case for damages.⁶ In fact, an injunction to stay waste has become almost a matter of course.⁷ The reason which caused the remedy by injunction to supersede the

remedy by writ of estrepement,⁸ was that the latter was applicable only to cases of real actions;⁹ and when the proceeding by ejectment became the usual mode of trying a title to land, as the writ of estrepement did not apply, courts of equity, acting upon the principle of preserving the property pendente lite, supplied the defect and interposed by way of injunction.¹⁰ Another advantage of the remedy by injunction is that not only may future waste be thus prevented, but an account may be decreed for past waste, and compensation be given therefor.¹¹ In order to prevent multiplicity of suits, a court of equity will, in such a case, make a complete decree, and not oblige the party to bring an action at law, but will decree an account and satisfaction for what is passed.¹² Still another advantage of the remedy by injunction is that it may not only be used to obtain an accounting for past waste, but may be invoked where no account of damages could be claimed as due,¹³ as where the waste is merely threatened,¹⁴ or where the waste done is so insignificant that even a court of law would have the right, as under an old statute, to remit the damages when they are sufficiently minute.¹⁵ No power of a court of equity is more clearly established than the jurisdiction to interpose by injunction in cases of waste, as well as in cases of private nuisance, and of great and irreparable injury to

the inheritance.¹⁶ There is, however, this difference in the scope of the equity jurisdiction to restrain waste as regarded in different American jurisdictions, that while in some it is strictly viewed and confined to cases of technical waste in which there is a privity of estate, and not extended to trespasses even where the mischief was irreparable, and operated as a permanent injury to the estate;¹⁷ in others the writ of injunction to stay waste is not founded on any privity of title or contract whatever, though it will not be employed to prevent a mere trespass, not instant and irreparable, where no suit has been instituted involving the title.¹⁸

1 Duvall v. Waters, 1 Bland, 569, 18 Am. Dec. 350; and see Lefforge v. West, 2 Ind. 514; McCoy v. Wait, 51 Barb. 225; Dennett v. Dennett, 43 N. H. 499; Clement v. Wheeler, 25 N. H. 361.

2 See 2 Daniell's Chancery Practice, 6th Am. ed., bottom p. 1620.

3 Duvall v. Waters, 1 Bland, 569, 18 Am. Dec. 350.

4 Jesus College v. Bloome, 3 Atk. 262, 263. See Denny v. Brunson, 29 Pa. St. 382, 383. The right to stay waste is recognized not only by courts of equity generally, but sometimes by the express provisions of statute: Miles v. Miles, 32 N. H. 147, 64 Am. Dec. 362, 363; or by a reasonable construction of such provisions: Denny v. Brunson, 29 Pa. St. 382, 384.

5 See 3 Blackstone's Commentaries, 227.

6 3 Pomeroy's Equity Jurisprudence, 2d ed., sec. 1348. Compare 4 Kent's Commentaries, 77, 78; 2 Daniell's Chancery Practice, 6th Am. ed., bottom p. 1620; 1 Maddock's Chancery, 138; Loudon v. Warfield, 5 J. J. Marsh. 196.

7 *Smith v. City Council of Rome*, 19 Ga. 89, 63 Am. Dec. 298, 300; *Markham v. Powell*, 33 Ga. 508, 512; sec. 120, ante.

8 See as to such superseding, *Duvall v. Waters*, 1 Bland, 569, 18 Am. Dec. 350, 356.

9 Compare *Duvall v. Waters*, 1 Bland, 569, 18 Am. Dec. 350, 354.

10 2 *Story's Equity Jurisprudence*, 13th ed., sec. 911, p. 218. See, for an instance of the granting of an injunction against waste, etc., in an ejectment suit, *Pulteney v. Shelton*, cited and distinguished in *Lathrop v. Marsh*, 5 Ves. 259, 260, and note 1 of American edition.

11 2 *Story's Equity Jurisprudence*, 13th ed., sec. 917, p. 221.

12 *Loudon v. Warfield*, 5 J. J. Marsh. 196, 198; *Jesus College v. Bloome*, 3 Atk. 262, 263; *Duvall v. Waters*, 1 Bland, 569, 18 Am. Dec. 350, 358; *Allison's Appeal*, 77 Pa. St. 221; *Ackerman v. Hartley*, 8 N. J. Eq. 476.

13 See *Duvall v. Waters*, 1 Bland, 569, 18 Am. Dec. 350, 357; *Universities of Oxford etc. v. Richardson*, 6 Ves. 689, 706.

14 *Gibson v. Smith*, 2 Atk. 182, 183; *Loudon v. Warfield*, 5 J. J. Marsh. 196.

15 *Universities of Oxford etc. v. Richardson*, 6 Ves. 689, 706. See *Duvall v. Waters*, 1 Bland, 569, 18 Am. Dec. 350, 357; *Livingston v. Reynolds*, 16 Wend. 115, 122. For an instance of judgment for the defendant on account of the recovery of trifling damages at law, see *Harrow School v. Alderton*, 2 Bos. & P. 86. The waste may, however, be too trivial under the circumstances to manifest an intent to do more than such as would call for the restraining interposition of equity: See *Barry v. Barry*, 1 Jacob & W. 651, 653, 655; sec. 120, ante. Compare also *Greathouse v. Greathouse*, 46 W. Va. 21-23.

16 *Scudder v. Trenton Del. Falls Co.*, 1 N. J. Eq. 694, 23 Am. Dec. 756, 759. See, as to such injury, *Atkins v. Chilson*, 7 Met. 398; *Powell v. Cheshire*, 70 Ga. 357, 48 Am. Rep. 572; *Nichols v. Jones*, 19 Fed. Rep. 855; *Bonaparte v. Camden etc. R. R. Co.*, 1 Bald. 205, 231; *Newall v. Staffordville Gravel Co.*, 13 Atl. Rep. 270, 271; *Lanier v. Alison*, 31 Fed. Rep. 100; *Erhardt v. Boaro*, 113 U. S. 537; *Doran v. Carroll*, 11 Ir. Eq. 379.

17 See *Leighton v. Leighton*, 32 Me. 399, 402.

18 Duvall v. Waters, 1 Bland, 569, 18 Am. Dec. 350, 363. Compare Amelung v. Seekamp, 9 Gill & J. 468, 472.

§ 624. When Injunction Obtainable.

In general, an injunction may be obtained in all cases where an action of waste would lie at common law, whether there be any privity of title or not,¹ and in a variety of other cases in which no action at law could be brought,² even where there was a subsisting privity of title or contract between the parties.³ In fact, there are numerous cases in which the court of chancery has interposed to stay waste by a tenant where no action could be maintained against him at law, because the plaintiff has not the immediate remainder,⁴ or in cases of mortgages,⁵ or like securities, or trusts.⁶ Nor is it, accordingly, essential that there should be an actual suit pending at law.⁷ Equity will likewise in many cases restrain waste, though the lease contains the clause "without impeachment of waste," which takes away the remedy at law;⁸ as where this power is exercised in an unreasonable manner, and against conscience.⁹ Formerly, however, injunction to restrain waste was granted only between parties holding privity of title;¹⁰ and he who had no title to the land was not entitled to an injunction restraining waste thereon,¹¹ so that for the plaintiff to state a case in which the defendant pretended that the

plaintiff was not entitled to the estate, or in which the defendant was asserted to claim under an adverse right, was said to be for the plaintiff to state himself out of court.¹² But the courts have, by insensible degrees, enlarged the jurisdiction to reach cases of adverse claims and rights, not founded in privity,¹³ as, for instance, to cases of trespass attended with irreparable mischief.¹⁴ And this extension of the jurisdiction has been regarded as especially salutary where the waste consists in digging and carrying away gold from a mine, even where the party seeking the injunction claims in a lottery the land on which the mine is found.¹⁵ A mere threat to commit waste is sufficient basis for obtaining an injunction.¹⁶ It is not necessary for the party to wait until the waste is actually committed;¹⁷ but there must be some act done, or threat made, on which to ground the injunction, and not a mere belief that waste is intended.¹⁸ Where injunction is sought to restrain a person from cutting timber, or otherwise intruding on a strip of land claimed by each party, and to obtain reparation for past intrusion and conversion of timber, a court of equity unquestionably has jurisdiction, *quia timet*.¹⁹ Courts of chancery are likewise said to grant injunctions against waste, to restrain acts against conscience and the existing rights of others;²⁰ and this principle unquestion-

ably seems to apply where the injunction is sought by an attaching creditor to prevent waste upon the attached realty by an insolvent debtor, such as would impair the lien of such creditor upon the land.²¹ By its inherent jurisdiction to restrain fraud, the court of chancery will, although the plaintiff may have a legal remedy, interfere to prevent waste being committed by a tenant for life in collusion with the owner of the first estate of inheritance, or by a person who unites both these characters in himself.²²

1 Duvall v. Waters, 1 Bland, 569, 18 Am. Dec. 350, 357. See Moore v. Ferrell, 1 Ga. 7, 11.

2 That equity has gone further in restraining waste than the law is asserted in Garth v. Cotton, 1 Ves. Sr. 546, 556.

3 Duvall v. Waters, 1 Bland, 569, 18 Am. Dec. 350, 357.

4 Kane v. Vanderburgh, 1 Johns. Ch. 11. See Perrot v. Perrot, 3 Atk. 94, 95; Robinson v. Litton, 3 Atk. 209, 210; Farrant v. Lovel, 3 Atk. 723.

5 Farrant v. Lovel, 3 Atk. 723; Robinson v. Litton, 3 Atk. 209, 210.

6 Robinson v. Litton, 3 Atk. 209, 210.

7 Kane v. Vanderburgh, 1 Johns. Ch. 11. See Denny v. Brunson, 29 Pa. St. 382, 384.

8 Kane v. Vauderburgh, 1 Johns. Ch. 11, 12. See Strathmore v. Bomes, 2 Bro. C. C. 88, 89.

9 Kane v. Vanderburgh, 1 Johns. Ch. 11, 12. See Aston v. Aston, 1 Ves. Sr. 262, 265.

10 Moore v. Ferrell, 1 Ga. 7, 10, 11. See Duvall v. Waters, 1 Bland, 569, 18 Am. Dec. 350, 358.

11 Loudon v. Warfield, 5 J. J. Marsh. 196, 198.

12 2 Story's Equity Jurisprudence, 13th ed., sec. 918, p. 222. See Pillsworth v. Hopton, 6 Ves. 51, 52; Smith v.

Collyer, 8 Ves. 89, 90; Norway v. Rome, 19 Ves. 144, 146, 147; Duvall v. Waters, 1 Bland, 569, 18 Am. Dec. 350, 359; Erhardt v. Boaro, 113 U. S. 537, 538; Le Roy v. Wright, 4 Saw. 530; 15 Fed. Cas. 386, 388; Newall v. Staffordville Gravel Co., 13 Atl. Rep. 270, 271.

13 Moore v. Ferrell, 1 Ga. 7, 11; Duvall v. Waters, 1 Bland, 169, 18 Am. Dec. 350; 2 Story's Equity Jurisprudence, 13th ed., sec. 918, p. 222. See Basore v. Henkel, 82 Va. 474.

14 2 Story's Equity Jurisprudence, 13th ed., sec. 918, p. 222. See Duvall v. Waters, 1 Bland, 569, 18 Am. Dec. 350, 358. Yet even after the doctrine had been modified in later cases, if the title to the property was disputed, that fact was regarded as sufficient to exclude the jurisdiction of the court: Le Roy v. Wright, 4 Saw. 530; 15 Fed. Cas. 386, 388; Norway v. Rome, 19 Ves. 144, 147; and even under the modern practice, a stronger and clearer case of irreparable mischief must be presented when the title is disputed than when it is undisputed: Le Roy v. Wright, 4 Saw. 530; 15 Fed. Cas. 386, 388; and see Spear v. Cutter, 2 Code Rep. 100; Nethery v. Payne, 71 Ga. 374; Erhardt v. Boaro, 113 U. S. 537.

15 Moore v. Ferrell, 1 Ga. 7, 11.

16 Duvall v. Waters, 1 Bland, 569, 18 Am. Dec. 350, 357; Loudon v. Warfield, 5 J. J. Marsh. 196; 1 Maddock's Chancery, 138. See Pence v. Garrison, 93 Ind. 345; Murphy v. Lincoln, 63 Vt. 278; Gibson v. Smith, 2 Atk. 182, 183; Barn. 491, 497; Coffin v. Coffin, Jacob, 70, 71; White Water Valley Canal Co. v. Comegys, 2 Ind. 469, 473; Hammond v. Martin, 15 Tex. Civ. App. 570, 573; Cox v. James, 45 N. Y. 557; Coeur d' Alene Min. Co. v. Miner's Union, 51 Fed. Rep. 260.

17 Gibson v. Smith, 2 Atk. 182, 183; 1 Maddock's Chancery, 138; Loudon v. Warfield, 5 J. J. Marsh. 196. See Duvall v. Waters, 1 Bland, 569, 18 Am. Dec. 350, 357.

18 1 Maddock's Chancery, 138; Green v. Keen, 4 Md. 98. See Hanson v. Gardiner, 7 Ves. 305b, 309, 310; Hannay v. M'Entire, 11 Ves. 54. Compare Campbell v. Allgood, 17 Beav. 623, 627, 628; Rodgers v. Rodgers, 11 Barb. 595, 601; White Water Valley Canal Co. v. Comegys, 2 Ind. 469, 473; sec. 120, ante; Bonaparte v. Camden etc. R. R. Co., 1 Baldw. 205, 232.

19 *Peak v. Hayden*, 3 Bush, 125, 126.

20 *Camp v. Bates*, 11 Conn. 51, 27 Am. Dec. 707, 710.

21 *Camp v. Bates*, 11 Conn. 51, 27 Am. Dec. 707, 710.

22 *Birch-Wolfe v. Birch*, L. R. 3 Eq. 683, 689. See *Ziegler v. Chapin*, 126 N. Y. 342.

§ 625. Preliminary Injunction Against Waste in Cutting Timber or Removing Minerals.

When courts of equity grant the temporary relief afforded by interlocutory injunctions, whether to restrain waste or in other cases, they are not to be regarded as in any manner forestalling the final action of courts of law, but simply as adjudging that the plaintiff presents such a case as justifies the court in preserving the status quo¹ until a court of law has had an opportunity of determining the controversy with all the facts before it, and with the assistance of a jury.² In such matters the plaintiff is not required to make out such a case as will entitle him to a decree in his favor on final hearing; and it sometimes happens that he ultimately fails to secure the relief asked for, while, nevertheless, the granting of the preliminary injunction was eminently proper; for the legal rights of the parties are not decided by the courts of equity, but the property in issue is guarded³ until those rights have been ascertained by the tribunal established for that purpose.⁴ This is particularly so in cases where the value of the property in dispute consists of

timber standing on the land, or in minerals under it; and in such instances, where both or several different parties claim title to the property in controversy, it is not uncommon to restrain them all from the cutting of timber or the removal of minerals, for the reason that, if it is permitted, it will result in injury to the rights and interests of the true owner.⁵ Like bills of quia timet, injunctions in such cases are in the nature of writs of prevention, intended to accomplish the objects of precautionary justice; and while it is true that under the ancient rules of courts of equity parties were left to their legal remedies in cases of trespass,⁶ it is equally true that at this time the practice prevails of allowing injunctions in such cases where the injury is irreparable.⁷ The true foundation of this jurisdiction is the probability of permanent injury to the property in dispute, the inadequacy of pecuniary compensation, and the prevention of a multiplicity of suits; and if the mischief complained of is irremediable, and destroys the substance of the property,⁸ such as the cutting of timber,⁹ the mining of minerals, and the extracting of ores,¹⁰ then, according to the practice as now well established in the federal courts,¹¹ as well as in the courts of a number of the states,¹² an injunction restraining such acts will issue, in order that the property may be preserved from destruc-

tion during such time as may be necessary to try the title at law.¹⁸

1 See *Bettman v. Harness*, 42 W. Va. 433.

2 *Buskirk v. King*, 72 Fed. Rep. 22, 24, 25; 18 C. C. A. 418, 420.

3 See *Bettman v. Harness*, 42 W. Va. 433.

4 *Buskirk v. King*, 72 Fed. Rep. 22, 25; 18 C. C. A. 418, 420.

5 *Buskirk v. King*, 72 Fed. Rep. 22, 25; 18 C. C. A. 418, 420; and see *Kane v. Vanderburgh*, 1 Johns. Ch. 11; *Livingston v. Livingston*, 6 Johns. Ch. 499, 10 Am. Dec. 353; *Ingraham v. Dunnell*, 5 Met. 126; *United States v. Gear*, 3 How. 120; *Erhardt v. Boaro*, 113 U. S. 537.

6 See *Erhardt v. Boaro*, 113 U. S. 537, 538; *Le Roy v. Wright*, 4 Saw. 530; 15 Fed. Cas. 386, 388; *Wood v. Braxton*, 54 Fed. Rep. 1005, 1008.

7 *Buskirk v. King*, 72 Fed. Rep. 22, 25; 18 C. C. A. 418, 420, 421. See *Bettman v. Harness*, 42 W. Va. 433; *Newall v. Staffordville Gravel Co.* (N. J. Eq.), 13 Atl. Rep. 270, 271; *Wood v. Braxton*, 54 Fed. Rep. 1005, 1008; *Mayor etc. v. Groshen*, 30 Md. 436, 96 Am. Dec. 591, 595, 596, and note, 596, 597; *Jerome v. Ross*, 7 Johns. Ch. 315, 11 Am. Dec. 484, 486-490, and note, 498-506.

8 See note to *Jerome v. Ross*, 11 Am. Dec. 501-504; *Bettman v. Harness*, 42 W. Va. 433.

9 See *Wood v. Braxton*, 54 Fed. Rep. 1005, 1008.

10 See *Erhardt v. Boaro*, 113 U. S. 537, 539; *Le Roy v. Wright*, 4 Saw. 530; 15 Fed. Cas. 386, 388; *Hunt v. Steese*, 75 Cal. 620, 624; *Lanier v. Alison*, 31 Fed. Rep. 100, 102; *Merced Min. Co. v. Fremont*, 7 Cal. 317, 320-324, 68 Am. Dec. 262.

11 See *Erhardt v. Boaro*, 113 U. S. 537, 539; *Le Roy v. Wright*, 4 Saw. 530; 15 Fed. Cas. 386, 388; *Wood v. Braxton*, 54 Fed. Rep. 1005, 1008; *Lanier v. Alison*, 31 Fed. Rep. 100, 102.

12 See, for example, *Newall v. Staffordville Gravel Co.* (N. J. Eq.), 13 Atl. Rep. 270, 271; *Hunt v. Steese*, 75 Cal. 620, 624; *Woods v. Riley*, 72 Miss. 73, 76; *Mer-*

ced Min. Co. v. Fremont, 7 Cal. 317-320, 324, 68 Am. Dec. 262.

13 Buskirk v. King, 72 Fed. Rep. 22, 25; 18 C. C. A. 418, 421. See Erhardt v. Boaro, 113 U. S. 537, 539; Le Roy v. Wright, 4 Saw. 530; 15 Fed. Cas. 386, 388; Lanier v. Alison, 31 Fed. Rep. 100; Snyder v. Hopkins, 31 Kan. 557; Kinsler v. Clarke, 2 Hill Eq. 617; Green v. Keene, 4 Md. 98.

§ 626. Enjoining Waste in Removal of Petroleum or Natural Gas.

Petroleum or mineral oil, in its place in the land, is a part of the land itself, just as are coal, timber, and iron;¹ and its unlawful extraction constitutes irreparable injury, such as undoubtedly gives ground for the interposition of the jurisdiction of equity to restrain the waste by injunction, even though the title be in controversy.² But a tenant for life may use the land and its profits, including mines of oil or gas open when his life estate begins, or lawfully opened and worked during its existence;³ and it is only when he bores for the oil for the first time that he commits waste such as may call for the interposition of equity by injunction or otherwise.⁴ Furthermore, petroleum oil, should it move from place to place by percolation or otherwise, forms part of that tract of land in which it tarries for the time being; and, if it moves to the next adjoining tract, it becomes part and parcel of that tract; and so, indeed, it forms part of some tract until it reaches a well and is raised to the sur-

face, and then for the first time it becomes the subject of distinct ownership separate from the realty, and becomes personal property, the property of the person into whose well it came.⁵ And while it is generally supposed that oil is drained into wells for a distance of several hundred feet, this is matter somewhat uncertain; nor can any right of sufficient weight be founded upon such uncertain supposition, to overcome the well-known right which every man has to use his property as he pleases, so long as he does not interfere with the legal rights of others;⁶ and if an owner or a lessee of oil lands drills an oil-well near the division line of his land, but confines his operations to his own land, protection of lines of adjoining lands by the drilling of wells on both sides of such lines affords an ample and sufficient remedy for any supposed grievances, without resort to either an injunction or an accounting.⁷ But the rule that the owner has the right to do as he pleases with or upon his own property is subjected to many limitations and restrictions, one of which is that he must have due regard for the rights of others, and this precludes one who sinks a gas-well in a thickly populated part of a city from collecting dangerous explosives with which to "shoot" the well, if his doing so will endanger the lives or property of persons having no connection with his operations; and such pro-

ceedings will be enjoined on the ground of such danger, though not because the operations will increase the flow of gas to the injury of an adjoining well owner.⁸

1 *Williamson v. Jones*, 39 W. Va. 231. See *Bettman v. Harness*, 42 W. Va. 433; *Williamson v. Jones*, 43 W. Va. 562, 565, 64 Am. St. Rep. 891; *Kelly v. Ohio Oil Co.*, 57 Ohio St. 317, 63 Am. St. Rep. 721, 722; *Marshall v. Mellon*, 179 Pa. St. 371, 57 Am. St. Rep. 601. Compare *Westmoreland etc. Gas Co. v. De Witt*, 130 Pa. St. 235, 249; *People's Gas Co. v. Tyner*, 131 Ind. 277, 31 Am. St. Rep. 433, 436.

2 See *Bettman v. Harness*, 42 W. Va. 433; *Williamson v. Jones*, 39 W. Va. 231. This jurisdiction is recognized in *Williamson v. Jones*, 43 W. Va. 562, 64 Am. St. Rep. 891.

3 *Koen v. Bartlett*, 41 W. Va. 559, 56 Am. St. Rep. 884, 887. See, also, *Marshall v. Mellon*, 179 Pa. St. 371, 57 Am. St. Rep. 601, 602; and as to quarries or mines in general, *Lynn's Appeal*, 31 Pa. St. 44, 46, 72 Am. Dec. 721. Concerning mining rights in general, see note to *McClintock v. Bryden*, 63 Am. Dec. 91-110.

4 *Williamson v. Jones*, 43 W. Va. 562, 64 Am. St. Rep. 891.

5 *Kelley v. Ohio Oil Co.*, 57 Ohio St. 317, 63 Am. St. Rep. 721, 722. This is so whether the oil moves, percolates, or exists in deposits; and in either event it is property belonging to the person who reaches it by means of a well, and severs it from the realty and converts it into personalty: *Kelley v. Ohio Oil Co.*, 57 Ohio St. 317, 63 Am. St. Rep. 721, 722.

6 As to the right to tap natural gas, see *Westmoreland etc. Gas Co. v. De Witt*, 130 Pa. St. 235, 249, 250; *People's Gas Co. v. Tyner*, 131 Ind. 277, 31 Am. St. Rep. 433, 437.

7 *Kelley v. Ohio Oil Co.*, 57 Ohio St. 317, 63 Am. St. Rep. 721-723.

8 *People's Gas Co. v. Tyner*, 131 Ind. 277, 31 Am. St. Rep. 433, 437.

§ 627. Enjoining Lessee's Material Alteration of Premises, or Subletting of Premises for Objectionable Purpose.

It is an old principle of the common law that a tenant is guilty of waste if he materially changes the nature and character of the building,¹ and a court of equity will restrain a lessee or sublessee from making such changes.² But, whether or not this doctrine applies to a lessee who keeps a drug-store and obtains a new lease for the purpose of subletting the premises for use in retailing spirituous liquors, equity will, on the ground of fraud, enjoin the lessee from such subletting, where he knows that the lessor would not rent the premises for that purpose, and does not inform the lessor of the use to be made of the premises.³

1 See *Kidd v. Dennison*, 6 Barb. 9, 13, 14. Compare *Pyncheon v. Stearns*, 11 Met. 304, 310, 312, 45 Am. Dec. 207.

2 *Parkman v. Aicardi*, 34 Ala. 393, 73 Am. Dec. 457, 458. See *Bonnett v. Sadler*, 14 Ves. 526, 529; *Douglass v. Wiggins*, 1 Johns. Ch. 435; *Maddox v. White*, 4 Md. 72, 78, 59 Am. Dec. 67.

3 *Parkman v. Aicardi*, 34 Ala. 393, 73 Am. Dec. 457, 458. See *Bonnett v. Sadler*, 14 Ves. 526, 528. As to enjoining lessee for ninety-nine years who has purchased four-fifths of the reversion from closing up, etc., private gangway to his adjoining estate, see *Beckwith v. Howard*, 6 R. L. 1, 7-17.

§ 628. In Whose Favor Injunction Against Waste may be Obtained.

In general, an injunction to stay waste may be obtained on the part of a person or persons having the next immediate vested estate of inheritance in the subject of the waste,¹ even² on behalf of a child en ventre sa mere.³ But though waste at common law, and apart from statutory changes, lies in favor of the immediate estate of inheritance only, in chancery a bill such as may pray for an injunction lies where there is an intermediate estate.⁴ Such an injunction may be obtained⁵ by trustees to preserve contingent remainders before the remainderman comes in esse.⁶ An injunction of this character may also be obtained⁷ by or on behalf of persons entitled to contingent⁸ or executory estates⁹ of inheritance; and in favor of a remainderman or reversioner where there is an intervening estate for life.¹⁰ The right of a remainderman generally to have such a remedy is fully recognized.¹¹

1 Maddock's Chancery, 139; and see Dickinson v. Jones, 36 Ga. 97; Van Syckel v. Emery, 18 N. J. Eq. 387; United States v. Parrott, 1 McAll. 271.

2 See Duvall v. Waters, 1 Bland, 569, 18 Am. Dec. 350, 357.

3 Robinson v. Litton, 3 Atk. 211, 212; see Musgrave v. Parry, 2 Vern. 711, per counsel; Garth v. Cotton, 1 Ves. Sr. 546, 555.

4 Dennett v. Dennett, 43 N. H. 499, 501, 502. See Perrot v. Perrot, 3 Atk. 94, 95; Vane v. Barnard, 2 Vern. 738, 739.

5 1 Maddock's Chancery, 139. See Duvall v. Waters, 1 Bland, 569, 18 Am. Dec. 350, 357.

6 Garth v. Cotton, 3 Atk. 751, 754; 1 Ves. Sr. 524, 528, 546, 555; 1 Dick. 183, 196.

7 1 Maddock's Chancery, 139, 140. See Duvall v. Waters, 1 Bland, 569, 18 Am. Dec. 350, 357.

8 Perrot v. Perrot, 3 Atk. 94, 95; Cannon v. Barry, 59 Miss. 289, 305. Compare Williams v. Duke of Bolton, 3 P. Wms. 268, note 1.

9 See Hayward v. Stillingfleet, 1 Atk. 422, 425; Robinson v. Litton, 3 Atk. 209, 211.

10 Berwick v. Whitfield, 3 P. Wms. 268, note F; Farrant v. Lovel, 3 Atk. 723; and see Robertson v. Meadors, 73 Ind. 43; Mayo v. Feaster, 2 McCord Eq. 137.

11 Miles v. Miles, 32 N. H. 147, 64 Am. Dec. 362, 363; Dickinson v. Jones, 36 Ga. 97, 103-106. See sec. 120, ante.

§ 629.. Against Whom Injunction to Stay Waste may be Obtained.

An injunction may be obtained¹ against tenant by the curtesy,² in dower, or as guardian,³ or as jointress, who is tenant for life,⁴ or against him who has a legal estate of inheritance, but being a trustee is not liable to an action of waste,⁵ to inhibit them from committing waste on houses, lands, or woods, by defacing or pulling down buildings, digging mines, or felling timber.⁶ In general, the right to obtain an injunction against a tenant for life who commits waste is fully recognized.⁷ In Michigan, although a statute gives a right of action at law for waste, this does not deprive the court of chancery of jurisdiction in proceedings to restrain

threatened waste.⁸ At common law, a tenant in common had no redress for acts of admitted waste committed by his cotenant. But it is well settled that in special cases an injunction will issue to restrain injuries to the freehold in the nature of waste between tenants in common.⁹ A tenant in common may be restrained in equity from felling ornamental trees, or from doing other things amounting to wanton and destructive waste, denominated "equitable waste," because allowable at law.¹⁰ A tenant in common may, in a suit for partition, be enjoined from committing waste.¹¹ Courts of equity interpose to prevent waste and preserve the corpus of the estate until partition.¹² A tenant for years may be restrained by injunction from cultivating or using the land in a grossly unhusband-like manner.¹³ And the instances are numerous where injunctions have been granted to restrain the acts of tenants.¹⁴

1 1 Maddock's Chancery, 139, 140.

2 Roberts v. Roberts, Hardr. 96.

3 As to equitable remedy against latter for waste, see Clarke v. Thorpe, 2 Ves. Sr. 232.

4 Aston v. Aston, 1 Ves. Sr. 264-266.

5 1 Maddock's Chancery, 140.

6 1 Maddock's Chancery, 139, 140. As to what constitutes timber, see Aubrey v. Fisher, 10 East, 446, or 2d Am. ed., vol. 5, pp. 460, 463, 465; Duke of Chandos v. Talbot, 2 P. Wms. 601, 606; Toby v. Molyne, Plow. 470. As to who has the right to timber so as to bring trover therefor, see Bowles' Case, 11 Coke, 79-84; also, Whitfield v. Bewit, 2 P. Wms. 240-242; further liti-

gated in 3 P. Wms. 268; Hargrave & Butler's Coke on Littleton, 218b, note 2; Pyne v. Dorr, 1 Term Rep. 55, 56. Concerning preservation of timber for contingent remaindermen, see Williams v. Duke of Bolton, mentioned in 3 P. Wms. 268, in note 1. As to what constitutes waste by tenant for life, see Miles v. Miles, 32 N. H. 147, 64 Am. Dec. 362, 364, 365; and as to the right of tenant for life to timber, see Smith v. Smith, 105 Ga. 106, 110, 111.

7 Robertson v. Meadors, 73 Ind. 43, 45; Hughes v. Burriss, 85 Mo. 660; Williams v. Peabody, 8 Hun, 271; Dalton v. Dalton, 7 Ired. Eq. 197; Ware v. Ware, 6 N. J. Eq. 117; Calvert v. Rice, 91 Ky. 533, 34 Am. St. Rep. 240.

8 Duncombe v. Felt, 81 Mich. 332.

9 See Coffin v. Loper, 25 N. J. Eq. 443; Hawley v. Clowes, 2 Johns. Ch. 122; Atkinson v. Hewitt, 51 Wis. 275.

10 McCord v. Oakland etc. Min. Co., 64 Cal. 134, 49 Am. Rep. 686; Calvert v. Rice, 91 Ky. 533, 34 Am. St. Rep. 240; and see Russell v. Merchants' Bank, 47 Minn. 286, 28 Am. St. Rep. 368; Dodd v. Watson, 4 Jones Eq. 48, 72 Am. Dec. 577; Stout v. Curry, 110 Ind. 514.

11 Coffin v. Loper, 25 N. J. Eq. 443; Weise v. Welsh, 30 N. J. Eq. 431.

12 Bradley v. Reed, 2 Pittsb. Rep. 519.

13 Wilds v. Layton, 1 Del. Ch. 226, 12 Am. Dec. 91.

14 See Baugher v. Crane, 27 Md. 36; Bröck v. Dole, 66 Wis. 142; Parkman v. Aicardi, 34 Ala. 393, 73 Am. Dec. 457; Maddox v. White, 4 Md. 72, 59 Am. Dec. 67; Godfrey v. Black, 39 Kan. 193, 7 Am. St. Rep. 544; Jungerman v. Bovee, 19 Cal. 354; Silva v. Garcia, 65 Cal. 591; Nicholson v. Rose, 4 De Gex & J. 10; London v. Hedger, 18 Ves. 355.

§ 630. Injunction as Between Mortgagee and Mortgagor.

An injunction may be obtained by a mortgagee against a mortgagor in possession who commits waste by cutting timber on the premises, or re-

moving buildings or fixtures therefrom, or by other acts involving serious or irreparable injury to the property, at any rate where the security of the mortgagee is thus rendered insufficient or greatly impaired;¹ and similarly, under proper circumstances, as between lessor and lessee, vendor and vendee.²

1 See note to *Webber v. Ramsey*, 43 Am. St. Rep. 432; *Gray v. Baldwin*, 8 Blackf. 164; *Cooper v. Davis*, 15 Conn. 556; *Bunker v. Locke*, 15 Wis. 702; *Robinson v. Preswick*, 3 Edw. Ch. 246.

2 See note to *Disher v. Disher*, 2 Am. Dec. Eq. 672; *Moses v. Johnson*, 88 Ala. 517, 16 Am. St. Rep. 58; *Miller v. Waddingham*, 91 Cal. 377; *Holmberg v. Johnson*, 45 Kan. 197; *Van Wyck v. Alliger*, 6 Barb. 507. Injunction to restrain waste by a stranger or trespasser: See *Sapp v. Roberts*, 18 Neb. 299.

§ 631. Injunction Against Waste by Tax Delinquents and Intervention by Land Claimant.

Injunctions are sometimes authorized by statute to be issued at the instance of township treasurers, to restrain waste upon lands on which taxes are due and remain unpaid.¹ Where land purchased by two persons, as partners, was afterward sold under the foreclosure of a lien for the purchase money, one of the partners, who was not a party to the foreclosure proceedings, had a right to intervene and establish his claim to the land in a suit by the purchaser to enjoin a tenant of such partner from cutting timber.²

1 See *Rossman v. Adams*, 91 Mich. 69, 70-73.

2 *Hendrick v. Tipton* (Ky.), 30 S. W. Rep. 618.

§ 632. Inadequacy of Legal Remedy.

It is not necessary, in order to obtain an injunction to restrain the commission of trespass or waste, that the plaintiff should aver or prove that he could not obtain adequate compensation in damages in a suit at law; but it is enough to invoke the jurisdiction of a court of equity that the value of the estate, in the character in which it is enjoyed, is imperiled.¹

¹ *Rakes v. Rustin Land etc. Co.* (Va.), 22 S. E. Rep. 498, 499; *Anderson v. Harvey*, 10 Gratt. 386, 398; *Manchester Cotton Mills v. Manchester*, 25 Gratt. 825, 828.

§ 633. Mandatory Injunction.

The authorities justify the use of a mandatory injunction in certain cases, and such an injunction will be amended to compel a lessee to close a door, where such lessee had obtained the lease of premises for a restaurant from the owner of two adjoining and connecting buildings, in one of which he kept a saloon, upon the express condition that no beverages should be sold there in competition with the saloon, but such lessee hired the premises adjoining the restaurant on the other side, and cut a door through the party-wall to connect with other premises, intending to open a saloon therein.¹

¹ *Klie v. Klie*, 56 N. J. Eq. 18, 33, 34.

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§ 634. State of Title as Affecting Right to Injunction Against Waste.

Under the more modern doctrine of the English court of chancery, an injunction would not be granted¹ where the right or title was doubtful² or disputed, as between devisee and heir at law,³ or otherwise.⁴ That court had steadily confined itself in granting relief against waste to those cases only where there was some subsisting privity of title until about the year 1785; but since that time it has gone one step further, and granted injunctions against strangers to stay trespass in strong cases of destruction or irreparable mischief; or where the irreparable mischief might be completely effected before any trial could be had as to the controverted right.⁵ But at that point it seems to have stopped; though not without expressing a regret that its jurisdiction had not been extended so far as to protect real estate from waste and injury pending a controversy about the title.⁶ In 1827, it appeared to be still the fixed rule of the court of chancery of England that the granting of an injunction to stay waste must depend either upon the fact of their being a privity of title or contract acknowledged by the answer, or an unquestionable legal or equitable title in the plaintiff, as in some suits for specific performance.⁷ For if the bill states and admits that the defendant asserts and relies upon

what he alleges to be an adverse title in himself, the plaintiff thereby states himself out of court,⁸ or if the defendant in his answer positively denies the plaintiff's title, the injunction will be refused,⁹ or, if it has been granted, will, on the coming in of such an answer, be dissolved.¹⁰ The high court of chancery of Maryland has, however, from a very early period, acted more in harmony with its general principles, by interposing to prevent waste and destruction in all cases during the continuance of a suit in which the title to the property has been or may be brought in question, as well where the subject of litigation was real estate as where it was mere perishable personalty, or money, or choses in action in the hands of the defendant.¹¹ A similar and equally extensive application of the writ of injunction to stay waste appears to have been made by the courts of chancery of Virginia¹² and South Carolina.¹³ In West Virginia it is also held, upon the fullest discussion, that equity has jurisdiction to prevent acts of irreparable injury to land, as by unlawful extraction of petroleum oil or gas from land, even though there is controversy as to the title; and that, having jurisdiction on that ground, it will go on to give full relief, even though in doing so it be necessary to decide between two adverse titles.¹⁴ In Georgia, where such facts or circumstances exist as injury

irreparable in damages, or the insolvency of the trespasser, or the need of interposition to avoid circuitry and multiplicity of actions, the plaintiff is not required to show a perfect title, but a *prima facie* title is all that is necessary for equitable interference, at least until a better outstanding title is shown.¹⁵ Nor are the provisions of the Civil Code of that state which require the plaintiff, in an application for an injunction to prevent the cutting of timber, to attach to his petition an abstract of his title and give a bond for damages when the restraining order is granted, applicable in a case where the plaintiff alleges and proves the insolvency of the defendant.¹⁶ In some American jurisdictions like Mississippi there has been a change of view on this subject, and while it was formerly held that injunction to stay waste will not lie where the defendant is in possession by an adverse title,¹⁷ or where plaintiff shows a doubtful title, if any,¹⁸ or, in fact, where the title is in dispute,¹⁹ a less rigid rule now prevails, more particularly under statutory regulation, whereby the modern practice is adopted, and the tendency of courts of equity is followed to extend relief temporarily, so as to protect against irreparable injury pending proceedings at law to establish the legal right.²⁰ In California, in an action of ejectment wherein an injunction was sought to restrain alleged insolvent trespassers

from committing irreparable waste on the demanded premises by wasting away the soil for mining purposes, it was explained that in all cases of this kind an injunction will be granted pending the determination of the issue as to ownership, unless it appear that the plaintiff's title is bad, or, at least, that there is no reasonable ground for the assertion of title by the plaintiff²¹ as the mere existence of a doubt as to the title does not of itself constitute a sufficient ground for refusing an injunction.²² In an early case in that state, however, it was held, upon the strength of one of the earlier Mississippi cases,²³ that an injunction to prevent the cutting of timber on land will not be granted, where the defendant in possession claims and holds under an adverse title, and the weight of evidence is in favor of his title;²⁴ though in another early case recognition was given, yet not without dissent, to the modern equity doctrine, and a preliminary injunction was held proper against an alleged trespasser removing auriferous quartz from a mining claim, though he claimed under an adverse title.²⁵

1 1 Maddock's Chancery, 138, 139.

2 Field v. Jackson, 2 Dick. 599, 600.

3 Smith v. Collyer, 8 Ves. 89, 90. See, also, Norway v. Rome, 19 Ves. 144, 154, 155. Compare Jones v. Jones, 3 Mer. 161, 173, 174.

4 Anonymous, 6 Ves. 51, 52.

5 Duvall v. Waters, 1 Bland, 569, 18 Am. Dec. 350, 358.

6 Duvall v. Waters, 1 Bland, 569, 18 Am. Dec. 350, 358. See, for the successive views of that court, Pillsworth v. Hopton, 6 Ves. 51, 52; Hanson v. Gardiner, 7 Ves. 305, 307-312; Smith v. Collyer, 8 Ves. 89, 90; Comthope v. Mapplesden, 10 Ves. 290, 291; Crockford v. Alexander, 15 Ves. 138, 139; Norway v. Rome, 19 Ves. 144, 154, 155; Jones v. Jones, 3 Mer. 161, 173, 174.

7 Duvall v. Waters, 1 Bland, 569, 18 Am. Dec. 350, 359.

8 See Pillsworth v. Hopton, 6 Ves. 51, 52; Smith v. Collyer, 8 Ves. 89, 90.

9 See Smith v. Collyer, 8 Ves. 89, 90; Norway v. Rome, 19 Ves. 144, 155.

10 Duvall v. Waters, 1 Bland, 569, 18 Am. Dec. 350, 359. See Norway v. Rome, 19 Ves. 144, 155.

11 Duvall v. Waters, 1 Bland, 569, 18 Am. Dec. 350, 361, 362.

12 Harris v. Thomas, 1 Hen. & M. 18, 19. In that state one making a fair prima facie showing in support of his title to land may obtain an injunction to restrain the commission of waste or trespass if the injury would be irreparable: Rakes v. Rustin Land etc. Co. (Va.), 22 S. E. Rep. 498, 499.

13 Shubrick v. Guerard, 2 Desaus. 616, 619, with note (a), 619, 622. See Duvall v. Waters, 1 Bland, 569, 18 Am. Dec. 350, 362. Compare, however, as to Kentucky, Loudon v. Warfield, 5 J. J. Marsh. 196, 198.

14 Bettman v. Harness, 42 W. Va. 433.

15 Smith v. Smith, 105 Ga. 106, 108. See McArthur v. Matthewson, 67 Ga. 134, 143.

16 Smith v. Smith, 105 Ga. 106, 108, 110.

17 Nevitt v. Gillespie, 1 How. 108, 112, 113, 26 Am. Dec. 696, 699, 700. See Eskridge v. Eskridge, 52 Miss. 522, 526.

18 Skipwith v. Dodd, 24 Miss. 487, 490.

19 See Eskridge v. Eskridge, 51 Miss. 522, 526.

20 Woods v. Riley, 72 Miss. 73, 76.

21 Hunt v. Steese, 75 Cal. 620, 624. See Porter v. Jennings, 89 Cal. 440, 445; Huron Waterworks Co. v. Huron, 3 S. Dak. 610, 619.

22 *Hunt v. Steese*, 75 Cal. 620, 624. See *Bullard v. Kempff*, 119 Cal. 9, 13, 14.

23 *Nevitt v. Gillespie*, 1 How. 108, 112, 113; 26 Am. Dec. 696, 699, 700.

24 *Smith v. Wilson*, 10 Cal. 528, 529.

25 *Merced Min. Co. v. Fremont*, 7 Cal. 317, 320, 324, 68 Am. Dec. 262.

§ 635. Who may Maintain Action for Waste.

An action of waste at common law could only be brought by one who had the immediate estate of inheritance; that is, an immediate reversion or remainder in fee or in tail.¹ The action was given to him who had the inheritance in expectancy, in remainder, or reversion, and one having an expectant interest in land less than the inheritance could not maintain the action.² No such action can be maintained by one having only a contingent remainder or executory devise.³ The injury done by waste is an injury to him who is entitled to the inheritance, and to no one else, and although an intermediate tenant for life may have an injunction to prevent those acts which are immediately injurious to his estate, yet he cannot recover for past waste, because that inures only to him who is entitled to the inheritance.⁴ The action of waste, in practice, is now but seldom used, and has given way to a more easy and general remedy, to wit, an action on the case in the nature of waste.⁵ The latter action extends to every case where one who has any reversionary interest

or estate in the premises suffers by the tortious act of the actual tenant or occupant, and the transfer of the estate afterward cannot operate to condone the wrong. The alienation of the property subsequently, or during the pendency of the suit, cannot operate to defeat the reversioner's right of recovery.⁶ The action may be brought by a reversioner or remainderman in fee simple, fee tail, for life, or for years.⁷ So, it is held that one who is entitled to the inheritance may recover in such action for an injury to the inheritance by the tenant in dower, though there be an intermediate life estate.⁸ And a purchaser in possession of lands under a contract to purchase, whether written or verbal, is a tenant at will and so may maintain the action for waste committed while in such possession.⁹ But a devisee of a contingent remainder cannot maintain the action.¹⁰ In Massachusetts, in an action of tort in the nature of waste, all the owners of the place wasted must join as plaintiffs.¹¹ A judgment creditor has a mere general, not a specific, lien upon the debtor's real estate, and cannot, therefore, maintain an action for waste committed thereon.¹² And it is held that a mortgagee cannot maintain an action of waste against the mortgagor until after forfeiture.¹³ The right of action against the mortgagor for waste, where the mortgagee is not entitled to possession,

is for the injury to the security, rather than to the freehold.¹⁴ Under Indiana Revised Statutes of 1881, section 287, a person seised of an estate in remainder or reversion may maintain waste or trespass for an injury to the inheritance, notwithstanding the intervening estate for life or years. A guardian cannot, however, maintain such action for his ward, but it must be brought by the ward in his own name, by next friend, as provided by statute.¹⁵ At common law, the action for waste did not survive.¹⁶ But it is otherwise by statute in a number of the states. Thus, in New York, the cause of action for waste survives to the personal representatives of the reversioner and is assignable.¹⁷ An action by a taxpayer to prevent waste of or injury to the property of a municipality is authorized by statute in New York;¹⁸ but this is confined to cases where the acts complained of are without power, or where corruption, fraud, or bad faith amounting to fraud is charged. If the officer is honest and faithful no suit against him is necessary.¹⁹ It was held that a tenant in common of land cannot bring an action for waste, or an action on the case in the nature of waste, unless there be destruction, so that an action of account, or a bill in equity for an account, would not be available, because nothing was received whereof an account could be taken, as where a tenant in common willfully

burns down the houses, or cuts down ornamental shade trees.²⁰ The North Carolina code, section 627, expressly authorizes one tenant in common to sue his cotenant for waste,²¹ and this includes the right to restrain its commission.²² Under the California statute (Code Civ. Proc., sec. 732), a tenant in common may recover damages of his cotenant in every case of waste.²³ By whom application may be made for an injunction to restrain the commission of waste has been pointed out in a preceding section.²⁴

1 Yool on Law of Waste, Nuisance, and Trespass, 4; Coke on Littleton, 218b, note 122; Hatch v. Hatch, 31 Week. Law Bull. 57; Robinson v. Wheeler, 25 N. Y. 252.

2 Peterson v. Clark, 15 Johns. 205; and see 14 Johns. 213; 3 Blackstone's Commentaries, 225. Legal title in the plaintiff is necessary to support the action: See Hughlett v. Harris, 1 Del. Ch. 349, 12 Am. Dec. 104, and note thereto.

3 Hunt v. Hall, 37 Me. 363; and see Greene v. Cole, 2 Saund. 252; 2 Wms. Saund. 644, notes.

4 Berwick v. Whitfield, 3 P. Wms. 267; Mayo v. Feaster, 2 McCord Eq. 137; Cannon v. Barry, 59 Miss. 289; University v. Tucker, 31 W. Va. 621. Compare Dawson v. Tremaine, 93 Mich. 320.

5 See Shult v. Barker, 12 Serg. & R. 272; Stetson v. Day, 51 Me. 434; Stevens v. Rose, 69 Mich. 259, 269; Woodhouse v. Walker, 5 Q. B. 494; Chase v. Hazelton, 7 N. H. 175.

6 Dickinson v. Mayor etc., 48 Md. 583, 30 Am. Rep. 492; Robinson v. Wheeler, 25 N. Y. 252.

7 McLaughlin v. Long, 5 Har. & J. 113. It may be maintained by any person aggrieved: See Cal. Code Civ. Proc., sec. 732.

8 Short v. Piper, 4 Harr. (Del.) 181; and see Livingston v. Haywood, 11 Johns. 429.

- 9 *Freeman v. Headley*, 33 N. J. L. 523.
- 10 *Sager v. Galloway*, 113 Pa. St. 500; and see *Hunt v. Hall*, 37 Me. 363.
- 11 *Bullock v. Hayward*, 10 Allen, 460.
- 12 *Lanning v. Carpenter*, 48 N. Y. 408. A judgment creditor who redeems land from a purchaser at execution sale cannot recover damages for waste committed by such purchaser prior to redemption: *O'Connor v. Bank of Attalla*, 116 Ala. 585, 67 Am. St. Rep. 146; and see *Otis v. McMillan*, 70 Ala. 46; *Morris v. Beebe*, 54 Ala. 300, 307; *Kannon v. Pillow*, 7 Humph. 292.
- 13 *Peterson v. Clark*, 15 Johns. 205. Compare *Southworth v. Van Pelt*, 3 Barb. 347. But he may maintain the action after condition broken: *Langdon v. Paul*, 22 Vt. 205; *Fay v. Brewer*, 3 Pick. 203.
- 14 *Smith v. Frio County* (Tex. Civ. App.), 50 S. W. Rep. 958; and see *Gardner v. Heartt*, 3 Denio, 233; *Edler v. Hasche*, 67 Wis. 656; *Van Pelt v. McGraw*, 4 N. Y. 110; *Jackson v. Turrell*, 39 N. J. L. 329. But compare *Byrom v. Chapin*, 113 Mass. 308; *Gooding v. Shea*, 103 Mass. 360, 4 Am. Rep. 563.
- 15 *Wilson v. Galey*, 103 Ind. 257; and see *Gwaltney v. Gwaltney*, 119 Ind. 144; *Bouton v. Thomas*, 10 N. Y. St. Rep. 827.
- 16 *Browne v. Blick*, 3 Murph. 511; *Compere v. Hicks*, 7 Term Rep. 732; and see *Page v. Davidson*, 22 Ill. 111.
- 17 *Rutherford v. Aiken*, 3 Thomp. & C. 60. See *Lippincott v. Barton*, 42 N. J. Eq. 272.
- 18 See Code Civ. Proc., sec. 1925.
- 19 *Talcott v. Buffalo*, 125 N. Y. 280; *Ziegler v. Chapin*, 126 N. Y. 342; *New York etc. R. R. Co. v. Maine*, 71 Hun, 417; 54 N. Y. St. Rep. 384; and see *Adamson v. Union R. R. Co.*, 74 Hun, 3; 56 N. Y. St. Rep. 314.
- 20 *Darden v. Cowper*, 7 Jones, 210, 75 Am. Dec. 461; and see *Anders v. Meredith*, 4 Dev. & B. 199, 34 Am. Dec. 376; *Smith v. Sharpe*, Busb. 91, 57 Am. Dec. 574; *Elwell v. Burnside*, 44 Barb. 447.
- 21 *Hinson v. Hinson*, 120 N. C. 400.
- 22 *Morrison v. Morrison*, 122 N. C. 598. See, also, Cal. Code Civ. Proc., sec. 732; *McCord v. Oakland etc. Min. Co.*, 64 Cal. 134, 49 Am. Rep. 686. It was said

that, by the common law, one tenant in common could not be guilty of committing waste, and was not liable to his cotenant in an action for waste for the injury done to their common estate: *Elwell v. Burnside*, 44 Barb. 447.

23 *McCord v. Oakland etc. Min. Co.*, 64 Cal. 134, 143, 49 Am. Rep. 686. Joinder of tenants in common in action of waste, see *Greenly v. Hall*, 3 Harr. (Del.) 9.

24 See sec. 628, ante.

§ 636. Against Whom Maintainable.

At common law, waste lay against a tenant in dower, tenant by the curtesy, and guardian in chivalry, but not against lessees for life or years.¹ And the reason given for the diversity was that the estates and interests of the former were created by law, and therefore the law gave a remedy against them, but the latter came in by the act of the owner who might have provided in his demise against the doing of waste by his lessee, and, if he did not, it was his negligence and default.² But the action of waste was given a wider range by the statutes of Marlbridge and Gloucester,³ and could be maintained against the lessee for life or years, or against the assignee of the same for waste done after the assignment.⁴ And it is held that the equitable action on the case in the nature of waste will be sustained in all cases, and against all persons, who are by the common law or under the statutes above mentioned liable to the action of waste.⁵ Privity is held to be no longer necessary in such action,

and it may be brought against a stranger.⁶ A stranger who commits waste upon leased premises or held by a particular estate is liable to the tenant for the injury to the possession, and to the landlord or reversioner for the injury to the freehold or inheritance. The right of each is distinct from that of the other, and satisfaction made to the one is no bar to an action by the other.⁷ The tenant is liable to the landlord or reversioner for waste by a stranger, and he has his remedy over against the stranger.⁸ But his recovery against the stranger for injuries to the freehold or reversion is dependent on his first having satisfied the landlord's claim by payment, or repair of the injured premises, and, in such case, the stranger is liable only for the payment, or expense necessarily incurred.⁹ The general rule is, that a lessee for life or years, without special covenants, is responsible to his lessor for all injuries amounting to waste done to the premises during his term, by whomsoever those injuries may have been done, with the exception of the acts of God, public enemies of the country, and the acts of the lessor himself.¹⁰ It was said that, at common law, an action of waste does not lie by the heir against the assignee of the tenant by the curtesy, but only against the tenant himself.¹¹ But it is held that this never had any application to tenancies created by the act of

the owner of the fee, and that a tenant cannot be held liable to the landlord, in an action for waste, where the waste was committed by an assignee of the tenant who was in exclusive possession of the premises.¹² But in such case, an action will lie against the tenant for breach of a covenant against waste contained in the lease.¹³ An action on the case in the nature of waste will lie against a tenant for years for permissive as well as voluntary waste;¹⁴ and so against a tenant from year to year.¹⁵ A tenant in possession having, by the terms of his lease, the privilege to purchase the demised premises, remains, until such privilege has been availed of, a mere tenant, subject to the same obligation as other tenants and answerable for any waste committed by him, but his liability to suit therefor is suspended until it is known whether or not he will avail himself of his privilege.¹⁶ At common law, a tenant at will may be held liable for voluntary waste, but not for merely permissive waste.¹⁷ And an action of waste cannot be maintained against a tenant by *elegit*.¹⁸ A mortgagee in possession is chargeable for waste, and in England, particularly, for timber trees cut.¹⁹ It has been held that an action of waste will not lie against a tenant in dower for injudicious or bad farming merely;²⁰ and it has been doubted whether, in any case whatever, she can be liable for permissive waste.²¹ And an ac-

tion does not lie against a mortgagor for permissive waste merely.²² At common law, guardians are chargeable with waste committed or suffered by them, and are liable therefor to their wards.²³ The remedy by injunction, and who may be restrained thereby from the commission of waste, constitute the matter of preceding sections.²⁴

1 Coke's Institutes, 299, 305; Coke on Littleton, 54.

2 2 Coke's Institutes, 299; Moore v. Townshend, 33 N. J. L. 284, 300.

3 See sec. 612, ante.

4 See Sackett v. Sackett, 8 Pick. 309, 313; Cook v. Champlain Co., 1 Denio, 103; Short v. Wilson, 13 Johns. 33; Curtiss v. Livingston, 36 Minn. 380; Sampson v. Grogan, 21 R. I. 174.

5 White v. Wagner, 4 Har. & J. 373, 7 Am. Dec. 674.

6 Dickinson v. Mayor etc., 48 Md. 583, 30 Am. Rep. 492. But see Lander v. Hall, 69 Wis. 326, 330.

7 California Dry-Dock Co. v. Armstrong, 17 Fed. Rep. 216.

8 Powell v. Dayton etc. R. R. Co., 16 Or. 33, 8 Am. St. Rep. 251; Austin v. Hudson River R. R. Co., 25 N. Y. 340; Lander v. Hall, 69 Wis. 326, 330. See Baker v. Hart, 26 Abb. N. C. 194.

9 California Dry Dock Co. v. Armstrong, 17 Fed. Rep. 216; Wood v. Griffin, 46 N. H. 231.

10 White v. Wagner, 4 Har. & J. 373, 7 Am. Dec. 674; Attersoll v. Stevens, 1 Taunt. 198; Heydon and Smith's Case, 13 Co. Rep. 69.

11 Bates v. Shraeder, 13 Johns. 260, 263.

12 Donald v. Elliott, 11 Misc. Rep. 120; 66 N. Y. St. Rep. 218.

13 Donald v. Elliott, 11 Misc. Rep. 120; 66 N. Y. St. Rep. 218.

14 Moore v. Townshend, 33 N. J. L. 284, 304.

15 Newbold v. Brown, 44 N. J. L. 266. But see contra, Torriano v. Young, 6 Car. & P. 8.

16 *Powell v. Dayton etc. R. R. Co.*, 16 Or. 33, 8 Am. St. Rep. 251. See *Stauffer v. Eaton*, 13 Ohio, 322; *Cornish v. Strutton*, 8 B. Mon. 586; *State v. Gramelspacher*, 126 Ind. 398.

17 See *Yool on Law of Waste, Nuisance, and Trespass*, 62; *Harnett v. Maitland*, 16 Mees. & W. 256; *Files v. Magoon*, 41 Me. 104.

18 *Scott v. Lenox*, 2 Brock. 57.

19 *Givens v. M'Calmont*, 4 Watts, 460, 463. See *McCormick v. Digby*, 8 Blackf. 99; *Furbush v. Goodwin*, 29 N. H. 321.

20 *Richards v. Torbert*, 3 Houst. 172.

21 See *Richards v. Torbert*, 3 Houst. 172; also, *Smith v. Follansbee*, 13 Me. 273, 280. Compare 4 Kent's Commentaries, 79.

22 *Gardner v. Heartt*, 3 Denio, 232.

23 *Bond v. Lockwood*, 33 Ill. 212.

24 See secs. 120, 623, 629.

§ 637. Pleadings.

In an action of waste the plaintiff need not set out his title particularly, but only that he is entitled to the immediate estate of inheritance.¹ But, if he states in what character he holds, he must state it truly, whether as reversioner or remainderman, and if he sets out the premises by metes and bounds, a variance in the proof will be fatal.² Where the action is against a tenant for life or years, the plaintiff must allege a seisin in fee in himself, as well as a demise to the tenant, and the omission to do so is not cured by the verdict.³ In an action on the case in the nature of waste, it is not necessary to set forth the title of the plaintiff, as in the action of waste.⁴ An allegation in a complaint against a tenant for life for

waste, that he sold and destroyed timber, without some description of the timber sold, or some statement of the attending circumstances, is held to be too indefinite to show waste on the part of such tenant for life.⁵ So it was held that a complaint does not sufficiently show waste by allegations of threats to remove furniture of a room, and that the plumbing will have to be taken out and the floor disturbed, without alleging that damage will result.⁶ A complaint in an action for waste brought under the Wisconsin statute is bad on demurrer, if it fails to show that there was some privity of estate between the parties. Unless there was such privity of estate, the injury is merely a trespass, and an action for waste is not maintainable.⁷ If an injunction is sought to restrain irreparable injury to the inheritance from a trespass threatened in the nature of waste, the complaint need not allege the insolvency of the defendant.⁸

1 *Greenly v. Hall*, 3 Harr. (Del.) 9.

2 *Greenly v. Hall*, 3 Harr. (Del.) 9.

3 *Carris v. Ingalls*, 12 Wend. 70.

4 *Green v. Cole*, 2 Saund. 252c, note 7; *Carris v. Ingalls*, 12 Wend. 70, 74.

5 *Stout v. Dunning*, 72 Ind. 343.

6 *Bucklen v. Cushman*, 145 Ind. 51.

7 *Lander v. Hall*, 69 Wis. 326.

8 *Crescent City etc. Co. v. Simpson*, 77 Cal. 286; and see *Silva v. Garcia*, 65 Cal. 591; *Duncombe v. Felt*, 81 Mich. 333. Evasive denials in an answer to a bill in equity praying an injunction to stay waste: See *Henry v. Watson*, 109 Ala. 335.

§ 638. Defenses.

Where the tenant repairs what would be held to be waste prior to action brought, this is held to be a good defense to the action for waste.¹ But it is no defense to such action against a tenant for life that he acted in good faith or under a claim of right, or that he was in possession claiming a fee.² Where a tenant is in possession under a lease containing a clause for the purchase of the demised premises within a specified time, the statute of limitations does not begin to run against an action for waste until the privilege is extinguished by lapse of time.³

1 Johnson v. Pettit, 1 Cin. Rep. 25; Jackson v. Andrew, 18 Johns. 431.

2 Robinson v. Kinne, 70 N. Y. 147.

3 Powell v. Dayton etc. R. R. Co., 16 Or. 33, 8 Am. St. Rep. 251.

§ 639. Evidence.

In an action against a life tenant by the remainderman for waste, the plaintiff must establish to the satisfaction of the jury, by the preponderance of the evidence, not only that the life tenant has committed the acts complained of, but that such acts have been injurious to the inheritance.¹ The plaintiff may recover on proof of negligent waste, although the complaint alleges that the waste was wrongfully committed.² In an action for waste, a witness should state facts,

and while he may give his opinion, accompanied by the facts upon which it is predicated, as to the number of acres from which the timber has been cut, the value of the land before and after it was cut, the whole number of acres in the tract, the proportions of timbered land and the like, he cannot be permitted to give in evidence his opinion that the estate of the remainderman has been damaged a certain amount by the defendant.³ Testimony to show that the land would be worth less with the timber cut off than with it on, and how much less, is inadmissible.⁴ But evidence of the value of the timber cut, and what part of it was suitable for timber, is held to be admissible.⁵ A lease not signed by the principal, but by and in the name of an agent, is admissible in evidence in an action against the principal for waste committed during the occupation of the premises by him, notwithstanding the statute of frauds.⁶

1 *Morris v. Knight*, 14 Pa. Supr. Ct. 324.

2 *Robinson v. Wheeler*, 25 N. Y. 252.

3 *Woodward v. Gates*, 38 Ga. 205; and see *McGregor v. Brown*, 10 N. Y. 114.

4 *Van Deusen v. Young*, 29 N. Y. 9; *Robertson v. Knapp*, 33 How. Pr. 309; 29 N. Y. 9. Compare *Morris v. Knight*, 14 Pa. Supr. Ct. 324.

5 *Rutherford v. Aiken*, 3 Thomp. & C. 60. And see *Morris v. Knight*, 14 Pa. Supr. Ct. 324.

6 *Marshall v. Rugg*, 6 Wyo. 270.

§ 640. Damages.

The statute of Gloucester (6 Edward I, c. 5), gave by way of penalty the forfeiture of the place wasted, and treble damages, and this rule was adopted in a number of the American states by the early statutes.¹ In Massachusetts, the rule was modified in respect to the tenant in dower;² and the California statute confined the remedy to the recovery of treble damages, not including a forfeiture of the estate.³ And forfeiture of the estate is not favored by the law.⁴ The right to recover treble damages in actions of the character of the former action of waste has not been abrogated by statute in New York, and it is not necessary for the complaint in such an action to contain a reference to the statute or provision for treble damages, to entitle the plaintiff to recover them.⁵ But where in such action treble damages were not claimed in the complaint, and judgment was entered for single damages only, and the plaintiff did not ask to have it set aside on the ground that he had not been awarded treble damages, it is too late to raise that question upon appeal.⁶ Under the law now in force in North Carolina,⁷ a tenant in dower, or other life tenant, who, by neglect or wantonness, occasions permanent waste or injury to the inheritance, thereby becomes liable to pay the actual damages, or treble damages in the discre-

tion of the judge, and also to forfeit the place wasted on a day to be fixed by the judge, if in the meantime the damages recovered have not been paid.⁸ The jury cannot allow damages for prospective waste. Damage can be assessed only up to the time of trial.⁹ In Michigan, the statutory remedy by an action on the case for waste has superseded the common-law remedy, and relieves the tenant from the penal consequences of waste under the statute of Gloucester, and the owner now recovers no more than the actual damages which the premises have sustained.¹⁰ When a mortgagor in possession has committed waste upon the mortgaged estate, by the removal of a building erected thereon, the measure of the mortgagee's loss is not the value of the building after severance, but the diminution in value of the mortgage security.¹¹ An instruction to the jury, as to the measure of damages, in an action against a life tenant for waste in cutting and selling timber, that it was not the particular value of any property or timber moved, as merchantable commodity, but the damage done to the land or inheritance owned by the reversioners, was held to be proper.¹² The jury may, therefore, properly consider the condition in which the wood land was left in determining the effect which the cutting of timber had upon the value of the inheritance.¹³

1 See *Sackett v. Sackett*, 8 Pick. 309; *Smith v. Sharpe*, 1 Busb. 91, 57 Am. Dec. 574; *Stevens v. Rose*, 69 Mich. 259, 269; *Clemence v. Steere*, 1 R. I. 272, 53 Am. Dec. 621; *Waples v. Waples*, 2 Harr. (Del.) 281.

2 *Sackett v. Sackett*, 8 Pick. 309.

3 *Chipman v. Emeric*, 3 Cal. 273. See Cal. Code Civ. Proc., sec. 732; *McCord v. Oakland etc. Min. Co.*, 64 Cal. 134, 49 Am. Rep. 686. In Wisconsin, judgment for waste is not attended by forfeiture of the estate: *Phelan v. Boylan*, 25 Wis. 679.

4 See *Williard v. Williard*, 56 Pa. St. 119, 129.

5 *Robinson v. Kinne*, 1 Thomp. & C. 60.

6 *Cleveland v. Wilder*, 78 Hun, 591.

7 See N. C. Code, sec. 629.

8 *Sherrill v. Connor*, 107 N. C. 630.

9 *Sherrill v. Connor*, 107 N. C. 630.

10 *Duncombe v. Felt*, 81 Mich. 332, 337, 338.

11 *Tate v. Field*, 57 N. J. Eq. 632; and see *Jackson v. Turrell*, 39 N. J. L. 329; *Schalk v. Kingsley*, 42 N. J. L. 32; sec. 630, ante.

12 *Morris v. Knight*, 14 Pa. Supr. Ct. 324; and see *McCullough v. Irvine*, 13 Pa. St. 438; *Yocum v. Zohner*, 162 Pa. St. 468.

13 *Morris v. Knight*, 14 Pa. Supr. Ct. 324.

§ 641. Account for Waste.

Ordinarily, an account for waste done is only incidental to relief by injunction against further waste,¹ and that only to prevent a multiplicity of suits.² As a general rule, if relief can be had in an action at law, a bill for an account cannot be sustained.³ If a tenant in common receives more than his share of the profits, by an excessive use of the property, or by an improper use of it, the remedy of the cotenant is by an action of account, or a bill in equity for an account.⁴ So, if

a tenant for life has cut down more of the wood on the estate than is necessary to the enjoyment of his estate, to the injury of the remainder in fee, he is liable to account for waste.⁵ A mortgagee in possession as such may be compelled to account for his waste of the mortgaged premises, and to submit to a deduction therefor from the mortgage debt; and such allowance may be made upon a bill to foreclose the mortgage, if the claim is presented by cross-bill.⁶ Extraction of coal or other mineral by one tenant in common without consent of another is waste, for which he must account to that other;⁷ and he cannot keep the proceeds of the sale of the mineral, without accounting, on the theory that the portion of land furnishing it is no more than his just share.⁸ Although a tenant in common occupying and using the common property separately will be responsible to his cotenants if he willfully or by gross negligence has destroyed or wasted the common property, he cannot be held responsible therefor in a case in which the bill for an accounting does not charge the destruction or waste and pray for relief against it.⁹

1 Ware v. Ware, 6 N. J. Eq. 117; Winship v. Pitts, 3 Paige, 259; Lippincott v. Barton, 42 N. J. Eq. 272.

2 Watson v. Hunter, 5 Johns. Ch. 169, 9 Am. Dec. 295; Ackerman v. Hartley, 8 N. J. Eq. 476; Grierson v. Eyre, 9 Ves. 341, 346.

3 Parrott v. Palmer, 3 Mylne & K. 632; Lippincott v. Barton, 42 N. J. Eq. 272.

4 Walling v. Burroughs, 8 Ired. Eq. 61; McCord v. Oakland etc. Min. Co., 64 Cal. 134, 49 Am. Rep. 686; and see Early v. Friend, 16 Gratt. 21, 54, 78 Am. Dec. 649; Ruffners v. Lewis, 7 Leigh, 720, 30 Am. Dec. 513.

5 Johnson v. Johnson, 2 Hill Eq. 277, 29 Am. Dec. 72. See Phillips v. Allen, 7 Allen, 115.

6 Onderdonk v. Gray, 19 N. J. Eq. 65; Davis v. Flagg, 44 N. J. Eq. 109; McMichael v. Webster, 57 N. J. Eq. 295, 73 Am. St. Rep. 630; and see Whiting v. Adams, 66 Vt. 679, 44 Am. St. Rep. 875, and note.

7 Williamson v. Jones, 43 W. Va. 562, 64 Am. St. Rep. 891.

8 Cecil v. Clark, 44 W. Va. 659; and see Newman v. Newman, 27 Gratt. 714; Graham v. Pierce, 19 Gratt. 28, 100 Am. Dec. 658.

9 Graham v. Pierce, 19 Gratt. 28, 100 Am. Dec. 658.

§ 642. Receiver.

It has been held that, in cases of conflicting claims to land, a receiver may be appointed to prevent waste and the expenses and troubles of threatened and reasonably expected litigation, arising from frequent conflicts over the possession pending a suit wherein the title is the subject of litigation.¹

¹ Hlawacek v. Bohman, 51 Wis. 92, 95.

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